160 U.S. 171

160-171

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~352~~ 73

EDDY B. TOWNSEND, APPELLANT,

vs.

MARY C. VANDERWERKER ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 21, 1891.

(14,949.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

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EDDY B. TOWNSEND, APPELLANT,

vs.

MARY C. VANDERWERKER ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 11, 1895.

a AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, John R. Young, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 18th day of December, 1891.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by John R. Young, clerk of the said court, to be in due form.

Witness my hand and seal this 18th day of Dec'r, 1891.

E. F. BINGHAM,
Chief Justice. [SEAL.]

Clerk's Certificate to Justice's Official Character.

I, John R. Young, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 18th day of December, 1891.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

[Endorsed:] Authentication of record.

1 *Original Bill.*

Filed Oct. 21, 1889. R. J. Meigs, clerk.

In the Supreme Court, District of Columbia, the 21 Day of October, 1889.

E. B. Townsend
vs.
Kate Vankerwerken, E. C. Chase, Samuel L. Thompson, Frederick A. Lawrence, R. E. White, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, Clinton L. Lawrence, Amos C. White, and Thomas B. Hood, Administrator of the Estate of Julia R. Marvin, Deceased.

In Equity.
No. 12084. Docket 30.

The plaintiff states as follows:

1st. He is a citizen of the United States, a resident of the District of Columbia, and brings this suit in his own right.

2d. The defendants Kate Vankerwerker, E. C. Chase, Samuel L. Thompson, Frederick H. Lawrence, R. E. White, Harper
2 H. Rogers, Ida F. Coon, Ella F. Rogers are citizens of the United States and reside in the State of New York.

The defendant Clinton L. Lawrence is a citizen of the United States and resides in the State of Colorado.

The defendant Amos C. White is a citizen of the United States and resides in the State of New York.

The defendant Thomas B. Hood, administrator as aforesaid, is a citizen of the United States and resides in the District of Columbia.

3d. The said Julia R. Marvin was in her lifetime seized in fee and possessed of a certain piece or parcel of land lying and being in the city of Washington, District of Columbia, and being known and described upon the ground plat or plan of the said city as lot numbered "one," in John B. Turton's subdivision of square numbered one hundred and seventy-nine (179), beginning at the S. E. corner of said lot and square and running thence west along the north side of L St. one hundred and ten (110) feet to the
3 east side of an alley ten (10) feet wide, thence north with the east line of the said alley thirty-four (34) feet to the N. W. corner of the said lot, thence east one hundred and ten (110) feet to the west line of Sixteenth street west, and thence south thirty-four (34) feet to the beginning.

4th. That the said Julia R. Marvin departed this life on the third day of February, 1889, intestate as to her real estate, and on the 31st day of May, 1889, letters of administration upon her personal estate were granted by the supreme court of the District of Columbia, sitting as a probate court, to the said Thomas B. Hood, who has duly qualified and given bond in the penalty of six thousand dollars ($6,000).

5th. That, as the plaintiff is informed and believes, the said defendants, Kate Vankerwerker, E. C. Chase, Samuel L. Thompson, Frederick A. Lawrence, R. E. White, Harper N. Rogers, Ida
4 H. Coon, and Clinton L. Lawrence, claim to be the next of kin to the said Julia R. Marvin and her sole heirs-at-law, but whether there are any other persons claiming to be the next of kin and the sole heirs-at-law of the said Julia R. Marvin the plaintiff is not informed and therefore is not able to state.

6th. That on the 9th day of August, 1888, the said Julia R. Marvin, by her deed duly executed & recorded in Liber No. 1330, folio 346, one of the land records of the District of Columbia, a copy of which is herewith exhibited, conveyed the said piece or parcel of land hereinbefore described in trust to secure the payment of ten thousand dollars, with interest thereon at six per cent. per annum, to the defendant Amos C. White; which said deed provided that the trustee therein named should sell the said house and lot at public auction in default of the payment of the said debt.

5 7th. That the said piece or parcel of land, with the building erected thereon, has been rented by said Julia R. Marvin ever since the said building was erected, in 1879, and the entire rents have been collected and received by the said Julia R. Marvin (the said rents from the year 1879 to the date of the death of the said Julia R. Marvin, on the 3d of February, 1889, amounting, as the plaintiff believes and charges, to at least the sum of ten thousand dollars ($10,000).

8th. That the said Julia R. Marvin, in addition to the said piece or parcel of land hereinbefore mentioned and described, died seized and possessed of other real estate which is liable to be sold and the proceeds of sale applied to the payment of her debts.

9th. That the said Thomas B. Hood, administrator as aforesaid, from the collections of debts due the estate of said Julia R.
6 Marvin and the sale of her personal effects has now in his hands a considerable sum of money, but the same is insufficient, as the plaintiff is informed and believes, to pay off & discharge the indebtedness due from the estate of the said decedent.

10th. That on or about the — day of March, in the year 1879, an agreement was made and entered into between the plaintiff and the said Julia R. Marvin by which the plaintiff undertook and agreed to contribute, in money and in work and labor, one-half of the original cost of the said piece or parcel of land and the dwelling-house to be erected thereon, and in consideration thereof the said Julia R. Marvin undertook and agreed to convey to the plaintiff one-half interest in the said piece or parcel of land and the dwelling-house to be erected thereon, so that the same should be owned jointly by the plaintiff and the said Julia R. Marvin;
7 that at the time of making said agreement there was no memorandum or note thereof in writing, but, in performance of the same on his part, the plaintiff gave his personal attention and supervision to the selection and purchase of the materials for the said dwelling-house and the erection of the same, and also paid, laid out, and expended a large sum of money, to wit, the sum of

four thousand dollars ($4,000), in defraying the cost of the erection of the said dwelling-house; that the said agreement, although not reduced to writing on account of the intimate personal relations existing between the parties and the entire confidence they reposed in each other, has been fully executed and performed by the plaintiff (the amount of money contributed by him, to wit, the sum of four thousand dollars ($4,000), and the value of his services
8 in selecting and purchasing the materials for the said dwelling-house and in superintending the erection of the same being equal altogether to one-half the cost of the said piece or parcel of land and the dwelling-house erected thereon); that the said Julia R. Marvin died without having executed her part of the said agreement by conveying to the plaintiff one-half interest in the said piece or parcel of land and the dwelling-house erected thereon, although she had repeatedly recognized the claim of the plaintiff in her lifetime and had declared to him and to others that she had made adequate provision for the same in her last will and testament.

11th. That the plaintiff is advised that, having performed on his part the said agreement hereinbefore mentioned and having contributed his money and services upon the faith of the said
9 agreement, it would be unjust and inequitable to deprive him of the benefit of the same, and that he is in justice and equity entitled to recover a sum equal to one-half of the value of the said piece — parcel of land and the dwelling-house erected thereon, and one-half of the rents for the same received and collected by the said Julia R. Marvin in her lifetime, and also one-half of the rents accruing since her death.

12th. In consideration of the premises and inasmuch as the plaintiff has no adequate relief at law and is relievable only in equity, where such matters are properly cognizable and relievable, he prays that the said Kate Vankerwerker, E. C. Chase, Samuel L. Thompson, Frederick A. Lawrence, R. E. White, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, Clinton L. Lawrence, Amos C. White, and Thomas B. Hood, administrator as aforesaid, may
10 by proper process be made parties defendant to this bill and required to answer the allegations thereof as fully and completely as if they were here again repeated and they thereupon specially interrogated; that it may be referred to an auditor of this court to take and report to the court the following accounts:

(1.) An account of the debt claimed by the plaintiff to be due and owing to him from the estate of the said Julia R. Marvin.

(2.) An account of the debt due and owing to the said Amos C. White from the estate of the said Julia R. Marvin and all other debts and demands against the same.

(3.) An account of the value of the said piece or parcel of land in the city of Washington and the dwelling-house erected thereon, and also an account of any other real estate of which the said Julia R. Marvin died seized and possessed and (*and*) the value thereof,
11 and that it be also referred to the auditor to ascertain and re-

port who are the next of kin and heirs-at-law of the said Julia R. Marvin, deceased.

(4.) An account of the rents of the said house and lot received and collected by the said Julia R. Marvin in her lifetime, and also a further account of any rent for the same due and unpaid since her death.

(5.) An account of the transactions of the said Thomas B. Hood, administrator as aforesaid, showing the collections made by him from the sale of the personal estate of the said Julia R. Marvin or otherwise, and what disposition has been made of the same.

That this honorable court will make a decree directing the payment to the plaintiff of a sum equal to one-half the value of the said house and lot hereinbefore mentioned and described and one-
12 half of the rents of the same received and collected by the said Julia R. Marvin in her lifetime and accruing since her death; that a decree may be made directing the sale of the said house and lot for the purpose of paying the debt claimed by the plaintiff to be due and owing to him from the estate of the said Julia R. Marvin and the distribution of the balance of the proceeds of such sale, if any, among those entitled, according to their respective rights and interests; that a decree may also be made for the sale of the other real estate of which the said Julia R. Marvin died seized and possessed if the same shall be necessary for the payment of her debts; that a writ of subpœna be issued against each of the said defendants in due form, and that all such other and further aid and relief may be given to the plaintiff as equity and good conscience may dictate and the nature of his case may require.

13 And, as in duty bound, he will ever pray, &c.

E. B. TOWNSEND.

GOODE & GOODE,
Solicitors for Plaintiff.

I do solemnly swear that I have read the foregoing bill by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

E. B. TOWNSEND.

Sworn to and subscribed before me this 19th day of October, 1889.

JERE H. WHEELWRIGHT,
Notary Public.

14 *Summons. Issued Oct.* 21, 1889.

In the Supreme Court of the District of Columbia, October 21st, 188–.

E. B. TOWNSEND, Complainant, *against* KATE VANKERWERKER *et al.*, Defendant-. } No. 12084, Equity Docket 30.

The President of the United States to Kate Vankerwerker, E. C. Chase, Samuel L. Thompson, Frederick A. Lawrence, R. E. White, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, Clinton L. Lawrence, Amos C. White, and Thomas B. Hood (P., Oct. 21, Ransdell), administrator of estate of Julia R. Marvin, deceased, defendants:

You are hereby commanded to appear in this court at its first special term occurring ten days after service of this subpœna and answer the exigency of the original bill, under pain of attachment and such other process of contempt as the court shall award.

Witness E. F. Bingham, chief justice.

R. J. MEIGS, *Clerk, &c.*,
By L. P. WILLIAMS, *Ass't Clerk.*

15 MEMORANDUM.—That the defendant herewith served is to enter — appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's Return, Nov. 5, 1889.

Served Thomas B. Hood, administrator of estate of Julia R. Marvin, dec'd, Octo. 21, 1889. All the others not to be found.

Novem. 5, 1889.

D. M. RANSDELL, *Marshal.*

GOODE & GOODE.

16 *Deed by Julia R. Marvin to John Goode, Exhibit to Bill.*

Liber 1330, folio 346.

Office of recorder of deeds, District of Columbia.

Julia R. Marvin to John Goode. } Recorded Aug. 13, 1888, 11.55 a. m. Trust.

This indenture made this 9th day of August in the year of our Lord one thousand eight hundred and eighty-eight between Mrs. Julia R. Marvin of the city of Washington and District of Columbia (widow) of the first part, and John Goode of said city and

District trustee of the second part. Whereas, the said party of the first part is justly indebted to A. C. White of the city of New York in the full sum of ten thousand
17 dollars for which amount she has executed her bond bearing date 9th day of August A. D. 1888, and whereas the said party of the first part desires to secure the full and punctual payment of said debt with interest thereon at the rate of six per cent. per annum when the said bond shall become due and payable, to wit: in ten years from the date thereof: Now therefore this indenture witnesseth, that the said party of the first part, for and in consideration of the premises aforesaid, and further the sum of one dollar in lawful money of the United States to her in hand paid by the said party of the second part, at and before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released and conveyed, and does by these presents grant, bargain, sell, alien, enfeoff, release and convey, unto the said party of the second part, his heirs and assigns all that certain piece or parcel of land lying and
18 being in the said city of Washington and District of Columbia and being known and described upon the ground plat or plan of said city as lot numbered one in John B. Turton's subdivision of square numbered one hundred & seventy-nine (179) beginning at the southeast corner of said lot and square and running thence west along the north line of Q street north one hundred and ten feet to the east line of an alley ten feet wide, thence north with the east line of said alley thirty-four feet to the northwest corner of said lot, thence east one hundred & ten feet to the west line of 16th St. west and thence south 34 ft. to the beginning. Together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the said party of the first part, of, in, to, or out of the said described real estate and premises, to have and hold the said described real estate and premises and appurtenances unto and to the use of the said party
19 of the second part his heirs and assigns. In and upon the trusts nevertheless, hereinafter mentioned and declared, that is, in trust to permit the said J. R. Marvin her heirs or assigns, to use and occupy the said described premises and the rents, issues and profits thereof, to take, have and apply, to and for her and their sole use and benefit, until default be made in the payment of said sum of ten thousand dollars or any proper cost, charge, commission, half commission or expense in and about the same. And upon the full payment of all of said sum and the interest thereon and all other proper costs, charges, commissions, half commissions and expenses, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said party of the first part her heirs or assigns at their cost. And upon this further trust, that upon default being made in the payment of the said sum
20 of ten thousand dollars or any proper cost, charge, commission, half commission or expense in and about the same, then

and at any time thereafter, to sell the said described real estate and premises, at public auction, upon such terms and conditions, and at such time and place and after such previous public advertisement, as the said party of the second part, his heirs or the trustee acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee-simple to and at the cost of, the purchase- or purchasers thereof, who shall not be required to see to the application of the purchase-money; and of the proceeds of said sale or sales, first to pay all, proper costs, charges and expenses, and to retain as compensation a commission of 5 per cent. on the amount of the said sale or sales; secondly, to pay whatever may then remain unpaid of the said debt and the interest thereon whether the same shall be due or not; and lastly, to pay the remainder, if any, to
21 said party of the first part, her executors, administrators and assigns. And the said party of the first part does hereby agree at her own cost, during all the time wherein any part of the matter hereby secured shall be unpaid or unsettled, to pay all taxes and assessments on said premises when due, and to keep the said improvements insured against fire, in the name and to the satisfaction of said party of the second part, who shall pay whatever may be received therefrom to the payment of the matter hereby secured, whether due or not; and that upon any fault or neglect to so pay said taxes and assessments or to so insure any party secured hereby may pay said taxes and assessments or may have said improvements insured, and the expense thereof shall be a charge hereby secured, and bear like interest as the matter secured. And it is expressly provided, that if said property shall be adver-
22 tised for sale under the provisions of this deed, and not sold, then the said trustee shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured, and the same is hereby secured.

In testimony whereof, the said party of the first part has hereunto set her hand and seal on the day and year first hereinbefore written.

JULIA R. MARVIN. [SEAL.]

Signed, sealed, and delivered in the presence of—

FRANK T. RAWLINGS.

DISTRICT OF COLUMBIA, } *ss*:
County of Washington, }

I, Frank T. Rawlings, a notary public in and for the said District, in said county, do hereby certify that Julia R. Marvin, party to a certain deed bearing date on the ninth day of August, A. D. 1888, and hereto annexed, personally appeared before me in the said District, the said Julia R. Marvin being personally well
23 known to me to be the person who executed the said deed, and acknowledged the same to be her act and deed.

Given under my hand and my notarial seal this ninth day of August, A. D. 1888.

FRANK T. RAWLINGS, [NOTARIAL SEAL.]
Notary Public.

OFFICE OF RECORDER OF DEEDS, *District of Columbia,* } ss:

I, James M. Trotter, recorder of deeds of the District of Columbia, do hereby certify that I have compared the annexed copy of trust — with the record of the original thereof, recorded in this [SEAL.] office on the 13th day of August, 1888, at 11.55 a. m., in Liber No. 1330, one of the land records of the District of Columbia, on page 346, and that the same is a correct transcript therefrom and of the whole of said record.

In testimony whereof I have hereunto set my hand and affixed my official seal this 20th day of January, 1890.

JAS. M. TROTTER,
Recorder of Deeds, District of Columbia.

24 *Order of Publication.*

Filed Nov. 8, 1889. R. J. Meigs, clerk.

In the Supreme Court, District of Columbia, the 8th Day of November, 1889.

E. B. TOWNSEND
vs.
KATE VANKERWERKER *et al.* } No. 12084. In Equity. Doc. 30.

On motion of the plaintiff, by Messrs. Goode & Goode, his solicitors, it is ordered that the defendants, Kate Vankerwerker, E. C. Chase, Samuel L. Thompson, Frederick H. Lawrence, R. E. White, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, Clinton L. Lawrence, and Amos C. White, cause their appearance to be entered herein on or before the first rule day occur-ing forty (40) days after this date; otherwise the cause will be proceeded with as in case of default.

The object of this suit is to obtain a decree for the sale of certain real estate in the city of Washington, District of Columbia, known and described upon the ground plat or plan of the said city
25 as lot numbered one, in John B. Turton's subdivision of square No. 179, for the purpose of paying the debt claimed by the plaintiff to be due to him and distributing the balance of the proceeds of sale among those entitled thereto.

By the court:

W. S. COX, *J.*

26 *Demurrer of Defendants to Bill.*

Filed Feb. 4, 1890. R. J. Meigs, clerk.

In the Supreme Court of the District of Columbia.

E. B. TOWNSEND, Complainant,
vs.
KATE VANKERWERKER *et al.*, Defendants. } In Equity. No. 12084.

The joint and several demurrer of the defendants, Mary Catherine Vanderwerker (in the bill by mistake called Kate Vankerwerker), Frederick H. Lawrence (in the bill called both Frederick A. Lawrence and Frederick H. Lawrence), Harper N. Rogers (in the bill called both Harper N. Rogers and Harper H. Rogers), Ida F. Coon (in the bill called both Ida F. Coon and Ida H. Coon), Ella F. Rogers, and Clinton L. Lawrence (in the bill called Clinton L. Lawrence), to the bill of complaint of E. B. Townsend, the above-named complainant, against these defendants and others exhibited.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of com-
27 plaint contained to be true in manner and form as the same are therein set forth, do demur thereto and for causes of demurrer show:

First. That the said complainant has not in and by his said bill disclosed his Christian name.

Second. That the said complainant hath not in and by his said bill stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants or either of them.

Third. That if the matters stated do give the complainant any cause of complaint against these defendants the same is triable and determinable at law and ought not to be inquired of by this court.

Fourth. That it appears by the said bill that neither the agreement or contract which is alleged by the said bill and of
28 which the complainant by the said bill seeks to have the benefit, nor any memorandum of note thereof, was ever reduced to writing or signed by the said Julia R. Marvin, deceased, the ancestor of these defendants, or by these defendants or either of them or any person thereunto authorized within the meaning of the statute in such case made and provided.

Fifth. That if the complainant ever had any cause of action or suit against the said Julia R. Marvin, deceased, the ancestor of these defendants, or against these defendants or either of them, for or concerning any of the matters in the said bill mentioned, which these defendants do in no sort admit, such cause of action or suit did not accrue or arise within three years before the filing of the said bill

or before serving or suing out process against these defendants to appear and answer said bill, and that the said Julia R. Marvin, deceased, the ancestor of these defendants, and these defendants
29 or either of them did not, at any time within three years next before the said bill was exhibited or process served on or issued out against these defendants to appear and answer the same, promise or agree to come to any account for or to make satisfaction or to pay any sum or sums of money for or by reason of the said matters charged in said bill.

Sixth. That the pretended claim set up by the complainant is stale and of a character that courts of equity will not countenance, because it would now be inequitable and unjust that the complainant should be permitted to enforce in any manner the alleged claim, if any he have, or to enforce an account or the payment of any sum of money from these defendants after having slept upon his rights, if any he have or ever had, for so long a time and until the said Julia R. Marvin is dead.

30 Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

J. H. LICHLITER,
Solicitor for Defendants, Mary C. Vanderwerker et al.

Certificate of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. H. LICHLITER,
Solicitor for Defendants, Mary C. Vanderwerker et al.

Affidavit.

STATE OF NEW YORK, }
County of New York, } ss.:

31 I, Frederick H. Lawrence, one of the above-named defendants, make oath and say that the foregoing demurrer is not interposed for delay.

FRED'K H. LAWRENCE.

Sworn to and subscribed before me this 23d day of January, A. D. 1890.

MARK ASH,
Notary Public, N. Y. Co.

Order Sustaining Demurrer.

Filed May 9, 1890. R. J. Meigs, clerk.

In the Supreme Court of the District of Columbia.

E. B. Townsend, Complainant,
v.
Kate Vanderwerker *et al.*, Defendants. } In Equity. No. 12084.

This cause came on for hearing at this term upon the demurrer of the defendants, Mary Catherine Vanderwerker, Frederick H. Lawrence, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, and Clinton I. Lawrence, to the bill of complaint, and was argued by
32 counsel for the respective parties and submitted; upon consideration whereof it is, this 9th day of May, A. D. 1890, adjudged and ordered that the said demurrer be, and hereby is, sustained, with leave to the complainant to amend his bill within sixty (60) days, as he may be advised.

And the question of costs for such amendment is reserved until the hearing.

By the court:

CHAS. P. JAMES, *Justice.*

33 *Amended Bill.*

Filed June 3, 1890. R. J. Meigs, clerk.

In the Supreme Court of the District of Columbia, the 3d day of June, 1890.

Eddy B. Townsend
vs.
Mary Catherine Vanderwerker, Frederick H. Lawrence, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, Clinton I. Lawrence, E. C. Chase, Samuel L. Thompson, R. E. White, Amos C. White, and Thomas B. Hood, Administrator of the Estate of Julia R. Marvin, Deceased, and John Goode, Trustee. } In Equity. No. 12084, Docket 30.

The amended bill of the plaintiff states as follows:

First. He is a citizen of the United States, a resident of the District of Columbia, and brings this suit in his own right.

Second. The defendants Mary Catherine Vanderwerker,
34 Frederick H. Lawrence, Harper N. Rogers, Ida F. Coon, Samuel L. Thompson, E. C. Chase, R. E. White, and Ella F. Rogers are citizens of the United States and reside in the State of New York; the defendant Clinton I. Lawrence is a citizen of the United States and resides in the State of Colorado; the defendant Amos C. White is a citizen of the United States and resides in the

State of New York; the defendant Thomas B. Hood, administrator as aforesaid, is a citizen of the United States and resides in the District of Columbia; the defendant John Goode is a citizen of the United States and resides in the District of Columbia.

Third. The said Julia R. Marvin was in her lifetime seized in fee and possessed of a certain piece or parcel of land lying and being in the city of Washington, District of Columbia, and being known and described upon the ground plat or plan of the said city as lot numbered one in John B. Thurton's subdivision of square
35 numbered one hundred and seventy-nine (179), beginning at S. E. corner of said lot and square and running thence west along the north side of I St. one hundred and ten feet (110) feet to the east side of an alley ten (10) feet wide, thence north with the east line of said alley thirty-four (34) feet to the N. W. corner of the said lot, thence east one hundred and ten (110) feet to the west line of Sixteenth street west, and thence south thirty-four (34) feet to the beginning.

Fourth. That the said Julia R. Marvin departed this life on the third day of February, 1889, intestate as to her real estate, and on the thirty-first day of May, 1889, letters of administration upon her personal estate were granted by the supreme court of the District of Columbia, sitting as a probate court, to the said Thomas B. Hood, who has duly qualified and given bond in the penalty of six thousand dollars ($6,000).

Fifth. That, as the plaintiff is informed and believes, the
36 said defendants, Mary Catherine Vanderwerker, Frederick H. Lawrence, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, Clinton I. Lawrence, E. C. Chase, Samuel L. Thompson, and R. E. White, claim to be the next of kin to the said Julia R. Marvin and her sole heirs at-law, but whether there are any other persons claiming to be the next of kin and the sole heirs-at-law of the said Julia R. Marvin the plaintiff is not informed and therefore is not able to state.

Sixth. That on the 9th day of August, 1888, the said Julia R. Marvin, by her deed duly executed, and recorded in Liber No. 1330, folio 346, one of the land records of the District of Columbia, a copy of which is herewith exhibited, conveyed the said piece or parcel of land hereinbefore described in trust to the said John Goode to secure the payment of ten thousand dollars, with interest thereon at six per cent. per annum, to the defendant Amos C. White, which said deed provided that the trustee therein named, the said John Goode, should sell the said house and lot at public auction in
37 default of the payment of the said debt.

Seventh. That the said piece or parcel of land, with the buildings thereon, has been rented by the said Julia R. Marvin ever since the said building was erected, in 1879, and the entire rents have been collected and received by the said Julia R. Marvin (the said rents from the year 1879 to the date of the death of the said Julia R. Marvin, on the 3d of February, 1889, amounting, as the plaintiff believes and charges, to at least the sum of ten thousand dollars ($10,000).

Eighth. That the said Julia R. Marvin, in addition to the said piece or parcel of land hereinbefore mentioned and described, died seized and possessed of other real estate, which is liable to be sold and the proceeds of sale applied to payment of her debts.

Ninth. That the said Thomas B. Hood, administrator as aforesaid, from the collection of debts due the estate of the said Julia R. Marvin and the sale of her personal effects, has now in his
38 hands a considerable sum of money, but the same is insufficient, as the plaintiff is informed and believes, to pay off and discharge the indebtedness due from the estate of the said decedent.

Tenth. That on or about the — day of March, in the year 1879, an agreement was made and entered into between the plaintiff and the said Julia R. Marvin by which the plaintiff undertook and agreed to contribute in money and in work and labor one-half of the orginal cost of the said piece or parcel of land and the dwelling-house to be erected thereon, and in consideration thereof the said Julia R. Marvin undertook and agreed to convey to the plaintiff one-half interest in the said piece or parcel of land and the dwelling-house to be erected thereon, so that the same should be owned jointly by the plaintiff and the said Julia R. Marvin; that at the time of making said agreement there was no note or memorandum thereof in writing, but in performance of the same on his part the plaintiff gave his personal attention and supervision to the selection and purchase of the materials for the said dwelling-
39 house and the erection of the same, and also paid, laid out, and expended a large sum of money, to wit, the sum of four thousand dollars ($4,000), in defraying the cost of the erection of the said dwelling-house; that the said agreement, although not reduced to writing, on account of the intimate personal relations existing between the parties and the entire confidence they reposed in each other, has been fully executed and performed by the plaintiff (the amount of money contributed by him, to wit, the sum of four thousand dollars ($4,000), and the value of his services in selecting and purchasing the materials for the said dwelling-house and in superintending the erection of the same being equal altogether to one-half the cost of the said piece or parcel of land and the dwelling house erected thereon); that the said Julia R. Marvin died without having executed her part of the said agreement by conveying to the plaintiff one-half interest in the said piece or parcel of land and
40 the dwelling-house erected thereon, although she had repeatedly recognized the claim of plaintiff in her lifetime and had declared to him and others that she had made adequate provision for the same in her last will and testament; that the services of the plaintiff in giving his personal attention and supervision to the selection and purchase of the materials for the said dwelling-house and the erection of the same were rendered in the years 1879 and 1880, and the money paid by the plaintiff in defraying the costs of the erection of the said dwelling-house and the original cost of the said piece or parcel of land was paid by him during the years 1879, 1880, 1881, 1882, 1883, and 1884 in various sums paid in hand to

the said Julia R. Marvin and sent to her in drafts by mail, as is evidenced by her repeated acknowledgements to the plaintiff and others during her lifetime and by certain checks endorsed by her.

That from the time of the rendition of the said services and
41 the payment of the said money by the plaintiff in performance of his said agreement until the day of the death of the said Julia R. Marvin the plaintiff constantly and repeatedly urged the said Julia R. Marvin to come to a settlement with him and to perform her part of the said agreement by conveying to him one-half interest in the said piece or parcel of land and the dwelling house erected thereon; that the said Julia R. Marvin always, whenever the subject was referred to, from the time the claim of the plaintiff accrued to the day of her death, recognized and acknowledged the validity & justice of the said claim and assured the said plaintiff that she had provided for the same in her last will and testament; that on the fourth day of January, 1888, the said Julia R. Marvin admitted to a mutual friend that the said house never would have been built but for the fact that she and the plaintiff had built it together, and that he had taken the management
42 of it all, as she never could have done & never would have attempted; that he had paid her in all four thousand dollars ($4,000), which she had used; that such was her feeling towards him that she intended the house should be his when she was done with it and should belong to them jointly while she lived; that on the 14th day of November, 1887, she acknowledged to the same mutual friend that the plaintiff had since 1878, when the lot was bought and they began planning for the house, up to 1883 paid her four thousand dollars ($4,000); that she had always regarded the house as belonging to them jointly; that she intended it should be his at her death, and that her will, then written, had so provided; that on account of the said repeated and constant acknowledgement of the validity of his claim by the said Julia R. Marvin from the time the services were rendered and the money was paid till the day of her death and on account of the representations hereinbefore referred to as having been made to the said
43 mutual friend and others, which representations were communicated to the plaintiff, and on account of the intimate personal relations always existing between the plaintiff and the said Julia R. Marvin and the unlimited confidence he reposed in her, they having lived together for a long time in the same dwelling-house & she having treated and spoken of him as a foster child, the plaintiff failed and omitted to take such measures for the enforcement of his rights as under other circumstances he would have taken. The plaintiff avers that by the course adopted by the said Julia R. Marvin and without any fault on his part he has been lulled into a false security, and that he would have instituted his suit during the lifetime of the said Julia R. Marvin for the specific performance of her contract but for the assurance, repeatedly made to him and to others, that she had by her will devised the entire property to him; that the plaintiff did not know until the death of

the said Julia R. Marvin of her failure to carry out her said
44 agreement, when it was discovered, to his surprise and that of others, that she had died intestate as to her real estate.

Eleventh. That the plaintiff is advised that, having performed on his part the said agreement hereinbefore mentioned and having contributed his money and services upon the faith of the said agreement, it would be unjust and inequitable to deprive him of the benefit of the same, and that he is in justice and equity entitled to recover a sum equal to one-half of the value of the said piece or parcel of land and the dwelling-house erected thereon and one-half of the rents for the same received and collected by the said Julia R. Marvin in her lifetime, and also one-half of the rents accruing since her death.

Twelfth. In consideration of the premises and inasmuch as the plaintiff has no adequate relief at law and is relievable only in equity, where such matters are properly cognizable and relievable,
he prays that the said Mary Catherine Vanderwerker, Fred-
45 erick H. Lawrence, Harper N. Rogers, Ella F. Coon, Samuel L. Thompson, E. C. Chase, R. E. White, Ella F. Rogers, Clinton I. Lawrence, Amos C. White, Thomas [illegible] administrator as aforesaid, and John Goode, trustee as [illegible] may by proper process be made parties defendant to [illegible] required to answer the allegations thereof as fully [illegible] as if they were here again repeated and they [illegible] interrogated; that it may be referred to an auditor [illegible] take and report to the court the following account:

(1.) An account of the debts [illegible] intiff to be due and owing to him from the estate of [illegible] R. Marvin.

(2.) An account of the debts due and owing to the said Amos C. White from the estate of the said Julia R. Marvin and all other debts and demands against the same.

(3.) An account of the value of the said piece or parcel
46 of land in the city of Washington and the dwelling-house erected thereon; and also an account of all other real estate of which the said Julia R. Marvin died seized and possessed and the value thereof, and that it be also referred to the auditor to ascertain who are the next of kin and heirs-at-law of the said Julia R. Marvin, deceased.

(4.) An account of the rents of the said house and lot received and collected by the said Julia R. Marvin in her lifetime, and also a further account of any rent due and unpaid since her death.

(5.) An account of the transactions of the said Thomas B. Hood, administrator as aforesaid, showing the collections made by
47 him from the sale of the personal estate of the said Julia R. Marvin or otherwise and what disposition has been made of the same.

That this honorable court will make a decree directing the payment to the plaintiff of a sum equal to one-half the value of the said house and lot hereinbefore mentioned and described and one-half of the rents of the same received and collected by the said Julia R. Marvin in her lifetime and accruing since her death; that a

decree may be made directing the sale of the said house and lot for the purpose of paying the debt claimed by the plaintiff to be due and owing to him from the estate of the said Julia R. Marvin and the distribution of the balance of the proceeds of such sale among those entitled according to their respective rights and interests; that a decree may also be made for the sale of the other real estate of which the said Julia R. Marvin died seized and possessed
48 if the same shall be necessary for the payment of her debts; that a writ of subpœna may be issued against each of the said defendants in due form, and that all such other and further aid and relief may be given to the plaintiff as equity and good conscience may dictate and the nature of his case may require.

And, as in duty bound, he will ever pray, &c.

EDDY B. TOWNSEND.

GOODE & GOODE,
Solicitors for Plaintiff.

I do solemnly swear that I have read the foregoing amended bill by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, & those stated upon information & belief I believe to be true

EDDY B. TOWNSEND.

Sworn and subscribed to before me this 22nd day of May, 1890.

W. M. ALLISON,
U. S. Cir. Court Commis., Dist. of Kans.

49 *Summons to Answer Amended Bill.*

Issued June 3d, 1890.

In the Supreme Court of the District of Columbia, June 3d, 1890.

EDDY B. TOWNSEND, Complainant, *against* MARY C. VANDERWERKER *et al.*, Defendants. } No. 12084, Equity Docket 30.

The President of the United States to John Goode, trustee, Defendant:

You are hereby commanded to appear in this court at its first special term occurring ten days after service of the subpœna and answer the exigency of the amended bill, under pain of attachment and such other process of contempt as the court shall award.

Witness E. F. Bingham, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk, &c.*,
By L. P. WILLIAMS, *Ass't Clerk.*

MEMORANDUM.—That the defendant herewith served is to enter appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

50 I hereby acknowledge se-vice.

JOHN GOODE.

GOODE & GOODE.

Joint and Several Demurrer of Mary C. Vanderwerker, Frederick H. Lawrence, et al., Defendants, to the Amended Bill of Complaint.

Filed June 28, 1890. R. J. Meigs, clerk.

In the Supreme Court of the District of Columbia.

EDDY B. TOWNSEND
v.
MARY C. VANDERWERKER *et al.* } In Equity. No. 12084.

The joint and several demurrer of the defendants Mary Catherine Vanderwerker, Frederick H. Lawrence, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, and Clinton I. Lawrence to the amended bill of complaint of Eddy B. Townsend, the above-named complainant, against these defendants and others exhibited.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said amended bill
51 of complaint contained to be true in manner and form as the same are therein set forth, do demur thereto and for causes of demurrer show:

First. That the said complainant hath not in and by his said amended bill stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants or either of them.

Second. That if the matters stated do give the complainant any cause of complaint against these defendants the same is triable and determinable at law and ought not to be inquired of by this court.

Third. That it appears by the said amended bill that neither the agreement or contract which is alleged by the said amended bill, and of which the complainant by the said amended bill seeks to have the benefit, nor any memorandum or note thereof was
52 ever reduced to writing or signed by the said Julia R. Marvin, deceased, the ancestor of these defendants, or by these defendants or either or any of them, or by any person thereunto authorized, within the meaning of the statute in such case made and provided.

Fourth. That if the complainant ever had any cause of action or suit against the said Julia R. Marvin, deceased, the ancestor of these defendants, or against these defendants or either or any of them for or concerning any of the matters in the said amended bill mentioned, which these defendants do in no sort admit, such cause of action or suit did not accrue or arise within three years before the filing of the said amended bill or before serving or suing out process against these defendants to appear and answer said bill.

Fifth. That the pretended claim set up by the complainant is stale and of a character that courts of equity will not coun-
53 tenance, the complainant having slept upon his rights, if any he have or ever had, for so long a time and until the said Julia R. Marvin is dead.

Sixth. That the said amended bill of complaint is multifarious in this, that it demands several matters of different natures against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said amended bill, these defendants do demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said amended bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

J. H. LICHLITER,
Solicitor for Mary Catherine Vanderwerker, Frederick H. Lawrence, et al.

54 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. H. LICHLITER,
Solicitor for Defendants Mary Catherine Vanderwerker, Frederick H. Lawrence, et al.

STATE OF NEW YORK, *County of New York,* } *ss.:*

I, Frederick H. Lawrence, one of the above-named defendants, make oath and say that the foregoing demurrer is not interposed for delay.

FRED'K H. LAWRENCE.

Sworn to and subscribed before me this 27 day of June, A. D. 1890.

MARK ASH,
Notary Public, N. Y. Co.

55 Filed Jul- 10, 1890. R. J. Meigs, clerk.

In the Supreme Court of the District of Columbia.

EDDY B. TOWNSEND, Complainant, *v.* MARY C. VANDERWERKER *et al.*, Defendants. } In Equity. No. 12084.

This cause came on for hearing at this term upon the demurrer of the defendants Mary Catherine Vanderwerker, Frederick H. Lawrence, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, and Clinton I. Lawrence to the amended bill of complaint and was argued by counsel for the respective parties and submitted; upon consideration whereof it is, this 10th day of July, A. D. 1890, adjudged, ordered, and decreed that the said demurrer be, and hereby is, sustained, and that the bill and amended bill of complaint be, and hereby are, dismissed, and that the defendants recover their costs, to be taxed by the clerk.

By the court:

A. B. HAGNER.

56 *Appeal to General Term.*

Filed ——, —.

In the Supreme Court of the District of Columbia.

TOWNSEND
vs.
VANDERWERKEN *et al.* } 12084. Equity.

The clerk will enter an appeal from the decree of July 10, 1890.

GOODE & GOODE,
Att'ys for Pl'ff.

July 11, 1890.

Appeal entered, as ordered, July 11, 1891.

BY THE CLERK.

57 Filed Oct. 27, 1891. J. R. Young, clerk.

In the Supreme Court of the District of Columbia.

EDDY B. TOWNSEND, Complainant,
v.
MARY C. VANDERWERKER *et al.*, Defendants. } In Equity. No. 12084.

This cause coming on to be heard in the general term upon the appeal of the complainant from the decree of the special term dismissing the complainant's bill and amended bill and having been argued by counsel for the respective parties and having been duly considered, it is by the court in general term, this twenty-seventh day of October, A. D. 1891, ordered, adjudged, and decreed that the said decree of the special term be, and the same hereby is, affirmed, and that the complainant's bill and amended bill be, and the same hereby are, dismissed with costs. From this decree complainant prays an appeal in open court, which is allowed.

By the court:

W. S. COX, *J.*

58 *Bond to Supreme Court U. S.*

Filed Nov. 23, 1891. J. R. Young, clerk.

In the Supreme Court of the District of Columbia, the — Day of ——, 1891.

EDDY B. TOWNSEND
vs.
MARY CATHERINE VANDERWERKER and Others. } No. 12084. On Appeal.

Bond of appeal to th*is* supreme court D. C.

Know all men by these presents that we, Eddy B. Townsend, James A. Bates, are bound unto the above-named Mary C. Vander-

werker, Fred. H. Lawrence, Harper N. Rogers, Ida F. Coon, Ella F. Rogers, Clinton I. Lawrence, E. C. Chase, Samuel L. Thompson, R. E. White, Amos C. White, Thomas B. Hood, administrator of the estate of Julia R. Marvin, deceased, and John Goode, trustee, in the sum of two hundred dollars, to be paid to the said Mary C. Vanderwerker and others, their executors or administraiors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 23rd day of November, 1891.

59 Whereas the above-named Eddy B. Townsend and James A. Bates *has* prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such that if the above-named Eddy B. Townsend shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EDDY B. TOWNSEND. [SEAL.]
JAMES A. BATES. [SEAL.]

Sealed and delivered in presence of—

F. W. McREYNOLDS.

Approved.

E. F. BINGHAM, *C. J.*

Endorsed on cover: Case No. 14,949. District of Columbia supreme court. Term No., 352. Eddy B. Townsend, appellant, *vs.* Mary C. Vanderwerker *et al.* Filed December 21, 1891.

Office Supreme Court, U. S.
FILED.
MAY 1 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 352.

EDDY B. TOWNSEND, APPELLANT,

vs.

MARY C. VANDERWERKER, *et al.*

Brief for Appellant.

JOHN GOODE,
Attorney for Appellant.

W. H. MOORE & CO., PRINTERS.

IN THE

Supreme Court of the United States.

No. 352.

EDDY B. TOWNSEND, APPELLANT,

vs.

MARY C. VANDERWERKER, *et al.*

Brief for Appellant.

In the court below, the defendants demurred to the complainant's bill upon several distinct grounds—want of equity, remedy at law, statute of frauds, statute of limitations, laches, and multifariousness.

The demurrer was sustained and the bill dismissed. From that decree an appeal has been taken to this court. In answer to the first ground of demurrer, it is sufficient we submit, to invite attention to the allegations of the bill which, for the purposes of the demurrer, must be accepted as true. It is a well-settled principle of equity pleading that a demurrer admits all the matters of fact alleged in the bill to be true so far as they are well pleaded. In answer to the second ground of demurrer, we submit that the matters stated in the bill are not triable at law, and if they were, a court of equity can exercise jurisdiction, provided a more complete rem-

edy can be thus afforded than at law. Wylie *vs.* Cox, 15 How., 415. It is not enough that there is a remedy at law: it must be plain and adequate or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. Boyce *vs.* Grundy, 3 Peters, 210. The objection that there is a remedy at law is only available where such remedy is as plain, adequate and effective as the remedy in equity. Sullivan *vs.* Portland R. R. Co., 94 U. S., 806. In answer to the third ground of demurrer, we submit that while it is true that the statute of frauds requires a contract concerning real estate to be in writing, it is equally true that courts of equity have relaxed the rigidity of this rule and hold that a part performance removes the bar of the statute on the ground that it is a fraud for the vendor to insist on the absence of a written instrument when he had permitted the contract to be partly executed. Neale *vs.* Neale, 9 Wall, 1. If it be clearly shown what the agreement was and that it has been partly performed, that is, that an act has been done, not a mere voluntary act, or merely introductory or ancillary to the agreement, but a part execution of the agreement, and which would not have been done unless on account of the agreement, an act, in short, unequivocally referring to and resulting from the agreement and such that the party would suffer an injury amounting to fraud by the refusal to execute that agreement; in such case, the agreement will be decreed to be specifically performed. Caldwell *et al. vs.* Carrington's heirs, 9 Peters, 86. Where one purchased and took the title of land in his own name but with the intention and under a verbal promise to convey it to another upon consideration that she should take care of him during the remain-

der of his life, as she had done in the past, and places her in possession of the property, and she does so take care of him during his life, she is entitled to a specific performance of the promise and to a conveyance of the title to her after his death by his executors and trustees. Brown *vs.* Sutton, 129 U. S., 238. The statute of frauds was designed to exclude oral evidence of the agreement of sale, not oral evidence of the acts of part performance or things done in execution of the agreement. Hall *et ux vs.* Hall *et al.*, 1 Gill, 383; see also West *vs.* Flannigan, 4 Maryland, 36; Marsorf *vs.* Howard, 4 Maryland, 459; Stoddard *vs.* Luck, 5 Maryland, 18; Bowie *vs.* Stonestreet, 6 Maryland, 418. An agreement to support or render services as a consideration for a verbal promise to convey lands, if carried out, is such a definite performance of the contract as entitles the promisee to a conveyance of the premises. Hiatt *vs.* Williams, 72 Mo., 214; Davison *vs.* Davison, 13 N. J. Eq., 246; Haines *vs.* Spanogle, 17 Neb., 637. An agreement by aged persons to will their property to one who would in consideration of that promise take care of them until death was upheld in Gupton *vs.* Gupton, 47 Mo., 37; see also Sutton *vs.* Hayden, 62 Mo., 101; Watson *vs.* Mahan, 20 Ind., 223.

In view of these and other authorities that might be cited, the complainant might properly have prayed for a decree enforcing specific performance of the contract. But such is not the prayer of his bill. A decree for specific performance would not have afforded the complete relief to which he deems himself entitled. It appears that on the 9th of August, 1888, after the said agreement had been entered into between the complainant, and Mrs. Marvin, she conveyed the lot of land described,

in trust, to secure the payment of ten thousand dollars, with interest, to the defendant, Amos C. White. Hence, it follows that a decree for the conveyance of an undivided half interest which would be subject to the deed of trust would not meet the justice and equity of the case because the complainant is entitled to one-half the value of the land and the building erected thereon. He is also entitled to one-half of the rents received and collected by Mrs. Marvin in her lifetime and accruing since her death.

The complainant not only prays for an account of the debt which he claims to be due to him from Mrs. Marvin's estate, but he prays also for an account of the rents collected by Mrs. Marvin in her lifetime, and a further account of any rent due and unpaid since her death. Is not this a sufficient ground for equity jurisdiction? Is there any principle of equity jurisprudence that forbids a joint tenant, or a tenant in common, to file a bill in equity for an account of rents received by his co-tenant? In answer to the fourth ground of demurrer, we submit, it is a well settled doctrine that the acknowledgment of a debt or obligation to which the statute of limitations applies, takes it out of the operation of the statute. Wait's Actions and Defences, Vol. 9, 287, and cases there cited. The complainant avers in his bill that "the said Julia R. Marvin always, whenever the subject was referred to, from the time the claim of the plaintiff accrued to the day of her death, recognized and acknowledged the validity and justice of the said claim." Again, in cases of fraud, the statute of limitations does not begin to run until the fraud is discovered. Moore *vs.* Green, 19 How., 69. If a party has perpetrated a fraud which has not been discovered until the statutory bar may apply to it at law,

courts of equity will interpose and remove the bar out of the way of the other injured party. Story's Eq. Jurisprudence, Ind. Vol., sec. 1521.

In answer to the fifth ground of demurrer, we submit that it cannot be sustained unless the facts and circumstances as stated in the bill show upon their face that the complainant has been guilty of gross laches, and that his failure to apply for relief sooner, is unexplained by any equitable circumstances. Brashear *vs.* Gratz, 6 Wheaton, 528; King *vs.* Hamilton, 4 Peters, 311. Although there has been delay on the part of the plaintiff in the assertion of his claim, a court of equity will afford relief if a reasonable excuse for such delay be shown. Platt *vs.* Vattier, 9 Peters, 405. There is no artificial rule on the subject of laches in the prosecution of rights, but each case as it arises must be determined by its own particular circumstances. McQuiddy *vs.* Ware, 20 Wallace, 14; Brown *vs.* Buena Vista Co., 95 U. S., 157. The sixth ground of demurrer is that the bill is multifarious. What is multifariousness? It is, according to all the authorities, the improperly joining in one bill of distinct and independent matters and thereby confounding them, as the uniting in one bill of several matters perfectly distinct and unconnected against one defendant or the demand of several matters of a distinct and independent nature, against several defendants in the same bill. In determining what constitutes multifariousness, each case must depend on its own circumstances and much must be necessarily left to the sound discretion of the court. Gaines *et ux vs.* Ralph & Chew, 2 How., 619; Oliver, *et al. vs.* Pratt, 3 How., 333. In order to support the objection of multifariousness because the bill sets out different causes of suit against the same person, it must appear that the

different grounds of suit are wholly distinct, and that each ground is sufficient as stated to sustain the bill. In Bedsole *vs.* Monroe, 5 Ired. Eq., 313, the court said that "if the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction or series of transactions forming one course of dealing and all tending to one end—if one connected story can be told of the whole—then the objection of multifariousness cannot apply."

A careful examination of the framework of this bill will be sufficient (we think) to satisfy the court that it could not have been properly dismissed on the ground of multifariousness, and that the demurrer for that as well as the other causes assigned should have been overruled.

Respectfully submitted,

JOHN GOODE,

Attorney for Appellant.

Supreme Court, U. S.
FILED.
OCT 26 1895
JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States

EDDY B. TOWNSEND,
Appellant,
vs.
MARY C. VANDERWERKER, et al.
Appellees.

No. 73

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

BUTTERWORTH & DOWELL,
Counsel for Appellant.

WASHINGTON, D. C.
THE CAPITAL PRESS
1895

IN THE

Supreme Court of the United States

EDDY B. TOWNSEND, APPELLANT,
vs.
MARY C. VANDERWERKER, ET AL. } No. 73

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

This case comes to this on appeal from the Supreme Court of the District of Columbia.

Eddy B. Townsend brought suit in the court below to recover an interest in certain real estate located in the city of Washington.

The defendants demurred on the ground among others that the claim was stale;

That the complainant had slept on his rights so long the court ought not to hear him.

The demurrer was sustained.

The action of the court below is here for review.

We submit that unless equity demands that one shall sue in cases where there is neither apparent necessity, apology, nor excuse for it, the demurrer should have been overruled. The alleged delay complained of was for less than five years and under circumstances to which I now call attention.

If the bill had recited in full the well-known and incontestable facts, which are, indeed, evidence, but yet proper in a pleading, no doubt could possibly have arisen. But as it is the allegations are entirely sufficient.

The reason for not bringing suit is not only sufficient, but on the facts recited a suit by Eddy B. Townsend against his foster-mother for a settlement and conveyance would have been not only unnecessary, but would have been an intolerable impertinence.

This court has repeatedly decided with regard to laches and lapse of time, that there is no arbitrary rule which applies to all cases regardless of the facts, but that each case will be judged according to the facts and circumstances, under a rule which requires vigilance on the part of one who seeks relief in a Court of Equity.

Under certain circumstances a delay of *twelve* months might be gross negligence and constitute laches, while a delay of twelve years would be excusable delay in the presence of other conditions.

The relation of parties and all the facts and circumstances determine whether the plaintiff shall be heard or shall be turned out of court.

In the case at bar the time that elapsed after an action *could* have been instituted was less than five years. But under the circumstances of this case, as they were known to Eddy B. Townsend and to his friends, a suit was not only not essential to protect his interest, but would have been a piece of reckless folly and an insult to his foster mother.

The propositions of law involved are so well established that I apologize for citing authorities to sustain them.

The Court on hearing the allegations of the bill will consider the testimony that would be competent to sustain those allegations, the allegations being admitted. Do these allegations properly call upon the defendants to answer? If they

do, the demurrer should have been overruled and the plaintiff heard.

In the tenth paragraph of the bill it is distinctly shown:

> 1. Julia R. Marvin and Eddy B. Townsend lived together for a long time in the same dwelling. She treated him and spoke of him as her foster son.

(In this connection it would be competent to show that she was a member of his father's family; that on the death of his mother the said Julia sustained toward plaintiff the relation of a foster mother; that the relation between them was that of affection and unreserved confidence; that they lived together in the same family before the arrangement to buy the lot and build the house was made; that they went into the house and resided together as one family as soon as the home was built.)

> 2. The bill distinctly alleges (in same paragraph) that in March, 1878, the plaintiff arranged with Julia R. Marvin to pay half the cost of the lot and half the cost of erecting thereon a dwelling, he to purchase the materials and superintend the erection of the building; that he was to own half and she half.

He bought the materials and built the home and paid in full his half; that he paid the last part due from him in *1884*.

> 3. It is distinctly alleged that she not only in no wise questioned that he had paid in full his half, but she stated to him and to their mutual friends that he had paid in full and was jointly interested with her in the premises. His right, his ownership of half the premises, was never disputed by her but was openly recognized by her.

> "4. When it was suggested or the request made that they settle and that she convey his half to him, she replied she had provided for that in her will, by which she gave him the *other half* as well. So he would take the entire property at her death. This

was satisfactory to him, and being so, he had no occasion to sue, and it would have been brutal to do so.

It is competent to show under this allegation the relation of trust and confidence, and how the relations originated and continued.

That as soon as they built the house they moved in and occupied and possessed the home together; he moving all his belongings to the home from which they were never removed until after the death of Julia R. Marvin, when these very distant heirs got possession of the key during his absence in the West.

It would be competent to show that Townsend was appointed to a position in the Government service which kept him most of the time in the West on the frontier; that Julia R. Marvin's health failed in 1885; that Townsend came and went with her to springs in New Mexico; that she continued to travel trying to regain her health, but without success, and returned to Washington in the fall of 1888, and died in February, 1889.

5. That on her death it was found that the will she had made, and of which Townsend and mutual friends had knowledge and which devised to him all the property, was gone, and she had while ill in the summer of *1888*, just before her death, written another will, mentioned hereinafter.

It is competent to show what cannot be disputed—the nature of her illness; that while in a condition induced by her sickness she herself wrote another will in which she gave her personal effects to Townsend's sisters and some personal friends; the bequest to Townsend being stock of the nominal value of $5,000, but of no real value.

The real estate in question she devised or tried to devise to the Minor school for colored children in the city of Washington; that as to the personal property the devise was good, but the

will not being executed with the formality required by law for the devise of real estate, failed as to that.

That Julia R. Marvin left neither parent nor child, nor grandchild, brother or sister, nephew or niece living.

That the heirs who are defendants here are remote, not near enough to know or to love, but still qualified to inherit.

That not one of these claimants was at the death bed nor at the sepulchre.

Townsend and his family were the watchers *before* and the mourners *after* death.

These heirs were strangers, while Townsend was of her own household.

As distinctly alleged in the bill, Townsend had implicit faith that Julia R. Marvin had kept and preserved the will which she had executed, vesting in him not merely the legal title to his half, but the title to this *whole* property.

I submit to the Court that to sue his foster mother, in whom he had as utter confidence as he had in his own mother when she was living, was not only not to be demanded or expected of him, but would have been an act of disloyalty to her and a piece of impudence which could only be excused in one in whom affection is measured by dollars and cents, and in whose breast the source of the higher and nobler emotions and sentiments is dried up.

If there is a case that comes within the rule that excuses delay in seeking relief in the courts this is one.

To sum up briefly—

a. Townsend, the appellant, and Julia R. Marvin sustained the relation of foster mother and son.

b. The relation was one of mutual affection and unreserved confidence.

3. As members of one family they agreed to build them a home, each to pay one-half the cost and expense thereof; each to own one-half.

d. Townsend was to and did procure the material and superintend the erection of the home.

e. They moved in and she never quitted legal possession until her death, and he never until the key was taken during his absence *after* her death.

f. He finished paying his half in 1884. She died in February, 1889.

g. They did not settle and she convey him half because she preferred to give him her half also, settling it all by her will.

h. He knew, as did their mutual friends, of the execution of that will.

i. She had no child, no parent, no brother or sister, no nephew or niece living.

She was of Townsend's household and *not* of these remote heirs.

It is competent to prove that she never mentioned one of them in either will, while she mentioned Townsend and his family in both.

WHAT THE BILL ALLEGES IN TENTH PARAGRAPH.

She stated both to Townsend and mutual friends that he had paid his half in full and was a joint owner with her of the property.

l. She did not settle with him and convey his half because she said she had provided to vest in him his half and her own too by will which she executed, and Townsend and their mutual friends were cognizant of the fact.

m. This was entirely satisfactory to Townsend, as Julia R. Marvin not only admitted that she held his half, that he was

the owner, but that she had executed a will vesting in him not only his half but her half as well.

n. On what ground, consistent with honor and decency, can he be charged with gross laches for not suing his foster mother under these circumstances?

o. What claim have these people to appropriate Townsend's property; what claim have they superior to his? They were remote relatives of hers, not near enough to cultivate or love, but still qualified under the law to *inherit*.

The demurrer below was bell-muzzled in order to hit somewhere.

The only point that even seemed to have traces of merit related to staleness, and in that belief I submit that both on reason and authority the demurrer should have been overruled and the defendants put upon their answer.

The Court must see that it is obvious that but for the fact of Julia R. Marvin acknowledging that Townsend was a joint owner with her, and her answering him and telling their mutual friends that instead of making the deed for half she had devised to him the whole by will, he would not have failed to assert his right; and

It must be equally clear that on that assurance from one he lived with as his mother, and being satisfied with the arrangement, he would have been little less than brutal to vex his foster mother with a suit that could not have inured to his advantage; Since in her affection for him, her foster son, she gave him the whole property.

He has not been guilty of laches; there is no trace of staleness about his claim. He has not slept on his rights *one hour*.

It is to be regretted that the known and incontestable facts were not set out fully in detail in the pleading, but that's past praying for now. But without the detailed facts the pleading is amply sufficient, and the demurrer should have been overruled.

As suggested, there is no trouble about the law. This Court and other Courts have so often stated the rule, setting forth that each case must be determined on the *facts* presented;

That the Court will determine whether there has been unreasonable delay such as to bar the party from a hearing—

And I submit that the allegation of the Bill meets fully the requirements of the rule in that behalf as this Court has laid it down.

I cite the authorities having already done better than that in showing that on reason and in justice the appellant is entitled to be heard and on that hearing there will be left no room to doubt.

AUTHORITIES CITED.

By way of further argument upon the demurrer to plaintiff's amended bill we respectfully submit:

That if there be *any part* of the bill that entitles the plaintiff to relief, the demurrer must be overruled.

Gunton *vs.* Carroll, 101 U. S. 428.

That the whole course of dealing between these parties shows the cause to be of equitable and not of legal jurisdiction, because it arose from the trust and confidence rightfully reposed in each other by reason of the fiduciary relation between them, which induced acquiescence on the one side in acts and reliance upon representations which might have been objected to or disbelieved by the other party, the plaintiff, except for the relations so existant, and which, under the circumstances, constituted a fraud upon the legal and equitable rights of Eddy B. Townsend by the decedent, Julia R. Marvin.

We claim first: That in contemplation of a court of equity the dealings of these parties with this property raised and continued A *Resulting Trust* therein, as between plaintiff and the the decedent, in his favor for one-half interest in and to said property.

He paid in cash on account of the purchase of the lot and the erection of the house thereon $4,000. He selected and bought the materials for the building, and personally superintended its entire construction, and the sum so paid, and the work, labor, and skill so done and exercised are alleged to have been equal in amount and value to one-half of the original cost of the property as improved.

The title was taken in her name, but she then undertook and agreed to convey one-half interest therein to him.

They long lived in the same house, and she regarded and treated him, and spake of him to others as a foster son. This agreement on her part, for such conveyance, was never completed, and no conveyance to him was made. When this fact was referred to by him she repeatedly stated to him, and to others, that she had provided by her will that the entire property should go to him absolutely at her death, and such statements to others were communicated to plaintiff.

> "Where two or more persons together advance the the price and the title is taken in the name of one of them, a trust will result in favor of the other with respect to a share of the property proportionate to his share of the price."
>
> American and English Cyclo. of law, vol. x, p. 15.
>
> "A resulting trust arises where several pay the consideration * * * and take title to one of their number * * *. Where two contribute funds and the proportions do not appear, the presumption is the proportions are equal."
>
> Perry on Trusts, vol. i, sec. 210. See also:
> Shoemaker *vs.* Smith, 11 Humphrey p. 81, Tenn.
> Edwards *vs.* Edwards, 39 Penna. State p. 369.
> Letcher *vs.* Letcher, 4 J. J. Marshall, 590 Ky.
>
> "In an action to enforce a resulting trust in land of which defendant's ancestor died seized; the evidence

showed that plaintiff advanced more than one-half of the consideration paid for the land, and that the decedent many times admitted that the plaintiff had a half interest in the land. Held: That the evidence justified a judgment for the plaintiff for a half interest in the land."

Reese *vs.* Murman, 5 Wash. State Rep., 373

This is precisely our case.

So in Dow *vs.* Jewell, 18 N. H. 340. Held: Admissions by one in possession in disparagement of his title and giving character to his possession, are competent evidence to show the true nature of his title and possession, against his grantees claiming under a subsequent conveyance.

Where land is purchased for two or more with their money and the convevance is made to one of the parties, there is a resulting trust in favor of the others. A bill in equity alleging that Jonathan Jewell laid out money belonging to himself, Jacob and Sally Jewell in purchase of land for their common use, benefit and advantage, and an agreement and understanding that Jonathan and Jacob should be owners in fee and tenants in common, each of moiety, and that Sally should have her wood from the land, and that a deed was taken to Jonathan, is a sufficient allegation of such a purchase as to raise a trust. In general a valid partition of lands cannot be made by parol, such case being within the statute of frauds. But a parol partition may be made of lands held under a trust arising by implication of law."

This again is strikingly like the case at bar. We have a joint purchase, a joint possession, an agreement for partition, and afterwards an agreement for devise from Julia R. Marvin to plaintiff, by reason of

which he did not enforce partition against his foster mother.

It may be objected that the payments from Townsend were not all in one sum or at one time. Since they agreed to and did jointly enter at once on the improvement of the land, that is not material.

Held: He who purchases at the time and pays after is as much a purchaser as if he bought for cash.

In Blodgett et al vs. Hiddreth, 103 Mass.,484.

The most common cases of proof by parol of arrangements for joint purchase of land are those of partners. There it has always been held the statute of frauds did not apply. See for example:

Foster vs. Hale, 5 Vesey, 309; Dale vs. Hamilton, 5 Hare, 369; Essex vs. Essex, 20 Bevan, 442. There is no difference in principle between these and the case at bar.

Second.

If this was a resulting trust the statute of frauds would not apply to it.

Section 9 of this act is as follows:

Sec. 9. Provided always: That where any conveyance shall be made of lands or tenaments by which a trust on confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding.

Sec. 9 p. 231 Comp. Stats. District of Columbia.

An implied or resulting trust always is to be established *dehors* the instrument of conveyance. If contained therein

it is express, and the rule of proof by parol, well settled regarding resulting trusts, could not apply.

Brown Stat. of Frauds, Sec. 84. These resulting trusts are not the creation of the statute, and in declaring them to be provable by parol it has only affirmed the common law. Also *Idem*, Sec. 85.

Resulting trusts of the first class in which the purchase money is paid by one, and the deed taken in the name of another, may be *pro tanto*, or for a part of the estate proportional to such part of the purchase money as the *cestui qui trust* may have advanced.

All trusts which arise by operation of law are excepted from the requirements of the statute of frauds.

Pomeroy Equity, Vol. 2, Sec. 1030.

Third. The statute of frauds cannot avail defendants, because there has been part performance by plaintiff. He has not only paid $4,000 in money for the purchase and improvement of the property, but he performed services in connection with the improvement of a kind and nature to change his situation and relation thereto. The technical rule treating payment only as not sufficient to take an agreement out of the statute is not applied where service has been rendered under the agreement. (See cases cited in brief of co-counsel.) Julia R. Marvin permitted the permanent and costly improvement of this property, knowing his reliance on her promise for its conveyance in moiety to him. Permanent and valuable improvements avoid the statute. This is well settled.

If it should seem that these special services are not analogous to those in cases cited by Mr. Goode, they certainly show possession of the property, and to plaintiff's dealing therewith as if it were his own. He made the permanent and costly improvement with his own skill, labor, and money united, and decedent accepted all, well knowing his reasonable expectation of the performance of the contract on her part.

It seems too late for those claiming under her to deny it. The case of Neale vs. Neale, 9 Wall., p. 1, was where a father agreed to convey to his son a lot upon his marriage with a certain lady. The marriage took place, and the son with the money of his wife built a house thereon. The father alleged indebtedness from the son to him. Specific performance was decreed. How would it have been different had the wife and her husband each furnished half the money?

Fourth. The statute of frauds is no defense, because there was not only the constructive fraud of delaying and refusing to make the conveyance, but the actual fraud of inducing plaintiff's acquiescence therein by stating to him and to others that she had devised the whole property to him by her will already executed. This might not have amounted to an actual fraud, except for the fiduciary relations then and long subsisting between the parties. The general principle of *fiduciary relations* is thus stated by Pomeroy Equity, Vol. 2, sec. 956:

"Wherever two persons stand in such relation that, while while it continues confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.* Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists *as a fact*, in which there is confidence reposed on one side and the resulting superiority and influence on the other."

"The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal."

So also Bigelow on Fraud, vol. 1, p. 262, says: "It is difficult to define the term fiduciary relation, "but it will probably be safe without excluding other possible cases to say that such a relation arises wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property or pecuniary interest, in whole or in part, or the bodily custody of one person is placed in control of another."

And further of *actual fraud*, Pomeroy, Equity vol. ii, sec. 921, says:

> Where an agreement has been verbally made which the statute requires to be in writing, and through the actual fraud of one party the execution of the written instruement is prevented and the other party is induced to accept and rely upon the verbal agreement as valid and binding, a court of equity will not permit the fraudulent party to set up the statute of frauds as a defense, but will enforce the agreement against him though it is merely verbal.

As bearing upon the equity of the case it will be noticed that Julia R. Marvin received the rents accruing during her life, as her representatives have done since her death, and about six months before her decease incumbered the property by a deed of trust to secure a loan of $10,000 from defendant White.

Fifth. The demurrer further relies on the statute of limitation of three years. Comp. Stats. Dist of Columbia, p. 360, sec. 6. It will be noted that this statute does not require the new promise to be in writing. It plainly appears from the amended bill that Julia R. Marvin always to the day of her death recognized and acknowledged the validity and justice of plaintiff's claim, and assured him that she had provided for it in her will. That she acknowledgsd the same to a mutual friend in November, 1887, and in January, 1888, each date being less than two years before the filing of the original bill herein. In Wood on Limitations, sec. 68, p. 185, it is said:

It is not necessary that the promise should be actual or expressed, provided the other necessary facts be shown. A clear, distinct, and unequivocal acknowledgement of the debt is sufficient to take a case out of the operation of the statute.

See also, Idem, sec. 68, p. 193.

It is not essential that the amount of the debt should be stated or even referred to. It is sufficient if the acknowledgement admits *something* to be due upon a specific claim, and parol evidence is admissible to prove the amount, and the same is true as to the nature of the indebtedness.

The statements to plaintiff and to the mutual friend seem to fulfill all the requisites of the authorities.

In equity the statute of limitions begins to run as to fraud from the time the fraud is discovered. Peck *vs.* Bank of America, 19 A 369, Rhode Island. Brake *vs.* Payne, 37 N. E., 140, Indiana Sup. Ct.

The fact that no will in favor of plaintiff devising this property to him was still in existence, as he had been led to expect by the promises and declarations of Julia R. Marvin, could not be known till after her death, and was not disclosed.

Sixth. Defendants plead that plaintiff has been guilty of *laches* such as should bar relief. There is no arbitrary rule as as to *laches*. The close and intimate relations of the parties have great weight in determining their respective rights and duties. If this delay was caused by bad faith and misrepresentation on the part of Julia R. Marvin, no imputation of *laches* can be made against plaintiff.

"In Gunton *vs.* Carroll, 101 U. S., 426, it was held: Complainants in an equity suit are not chargable with *laches* caused by defendants therein. Nov. 3d, 1846, an agreement was made the foundation of the suit; it provided for the partition of certain property and the conveyance by defendant Carroll of his share to the bank. No partition was made till 1866, and knowledge of this did not come to complainants till 1872.

They began this suit in 1876. Held delay was caused by Carroll and his devisees and for this complainants can not be chageable with *laches*. In Loring *vs.* Palmer, 118 U. S., p. 321. Held: The cestui qui trust will not be held to have lost his rights by laches where the evidence shows the delay was due to the fault and misstatements of the trustee. Loring, the trustee for Palmer and others, claimed a balance due him from Palmer arising out of the purchase and working of mineral lands, and brought suit therefor, but afterwards abandoned it. It turned out that the true balance was in Palmer's favor. In a suit by him to enforce the trust, held: That Loring's erroneous accounts and misstatements excused a delay of six years by Palmer. There can be no doubt in the case in hand, that the confidence reposed by plaintiff in the promise regarding a provision for his claim by will, and the statements that a will had been executed led him to delay the assertion of his rights by suit, which was promptly brought when the fraud was known by him. In the Gunton case there intervened a term of thirty years from the original contract. The partition of Carroll's land was made, and must have been of record in 1866. Complainants knew of it in 1872; yet suit was not brought by them till four years later. The holding clearly shows how much depends on the circumstances and relation of the parties. It is morally certain that as against any one not as near to him as descendant, plaintiff would have enforced his rights at once, and it is as sure that he would have done so against Julia R. Marvin but for her frequent reresentations touching her will. Such abuse of confidence appeals to the conscience of the Court ground of Equity.

"Where one-half of a property has been paid for, including the purchase and the improvement, and the party so doing has permitted the other to enjoy the rents and profits for a series of years, and to encumber the same for her own benefit to a large amount, such considerations conform with what we have before dilated upon, and certainly should impart equity and for relief in a Court of Chancery.

And further as to laches—

In Ayres vs. Morehead's admr., 77 Va., 586, held:

> "Where evidence exists which proves that defendant has all along recognized plaintiff's right, delay on part of plaintiff will be excused.

See also Callender vs. Colegrave, 17 Conn., p. 1.

"Where delay of the plaintiff to seek relief was occasioned in part, at least, by the promise of the defendant to rectify the errors complained of, the existence of such errors came to the knowledge of the plaintiff gradually, and the circumstances were such that the defendant could suffer nothing to delay, it was held that the plaintiff was not precluded from relief on the ground of his not having sought it within a reasonable time."

So in Dickerman vs. Burgess, 20 Ills., 266.

"A party cannot claim a benefit or the aid of a court of equity who has been guilty of laches in protecting his rights, unless such laches may be imputable to the party claiming against him."

This delay was caused by the confidence of Townsend in Julia R. Marvin, and by her assurance that she has provided for a devise to him of the house and lot in her will, and that she had executed such will, and the fact that she destroyed said will just before har death not being disclosed to him, such declarations by her were in effect a fraud upon him.

Lapse of time alone is no bar. Where the trust is admitted, and there has been no adverse holding, lapse of time is no bar.

Dow vs. Jewell *supra*.

Lapse of time alone is not a test of staleness.

Paschall vs. Hinderer, 28 Ohio St., 568.

In 1830, H resided in Germany with his family, consisting of a wife and three minor children by her former husband. Intending to remove with his wife to the United States, he obtained permission of the guardian of the children and of the

proper court to take with him these children and a sum of money in the guardian's hands, derived from their father's estate, on the express condition that, on his arrivaal here, he would invest this money in lands in their names. On his arrival here he purchased land, paid for it in part out of this money, and in part out of his own, moved on it, but took the title in his own name, and thereafter occupied it as a home and as a means of support for the family until the children arrived of age and afterward. Held:

1. That by taking the whole legal title in his own name H committed a breach of trust; and, to the extent that the purchase money was paid out of the money belonging to the children, he holds the title in trust for them.

2. That the continued possession and use of said land as a home, and for the support of the family during the minority of the children, was not adverse to the rights and equity of the children and neither the lapse of time nor the Statute of Limitations would operate against them during such minority.

3. The trust which resulted to the children was one not cognizable at law, but was peculiarly and exclusively within the jurisdiction of a court of equity, against which while it subsisted mere lapse of time was no bar.

4. The continued possession of the property as a home after the children came of age by H, without any denial or disclaimer of the children's rights in it, and without claim to own or hold adversely to them for a less period than 21 years, constituted no bar to a suit to compel an execution of the trust, nor will the lapse of a less period than would bar an action in law to recover the title or possession of land of itself raise a presumption that the trust had been discharged or extinguished.

5. What constitutes a stale equity depends on the facts and circumstances of each case and not on lapse of time alone.

Here, as in the case at bar, the parties belonged to the same

family. The importance of such association, and the confidence naturally flowing therefrom, are of weight in fixing the rights and duties of all so related.

Story Eq. Int. sec. 1520.

We respectfully submit, therefore, that the allegations of the plaintiff's amended bill entitled him to relief; that in law and equity the objections urged thereto are insufficient, and that the court of chancery, having all parties in interest before it, and treating that as done which should be done, should make its decree in his favor and provide for such an accounting as under the facts may be needful to give effect to the same.

Chas. Butterworth & Dowell,
Attorneys for Appellant.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 352.

EDDY B. TOWNSEND,

Appellant,

vs.

MARY C. VANDERWERKER et al.

BRIEF FOR APPELLEES.

J. H. LICHLITER,
Counsel for Appellees.

McGILL & WALLACE, Law Printers, Washington, D. C.

(14,949.)

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OCTOBER TERM, 1894.

No. 352.

EDDY B. TOWNSEND, Appellant,

vs.

MARY C. VANDERWERKER *et al.*

Statement of the Case.

This is an appeal from a decree passed by the General Term of the Supreme Court of the District of Columbia dismissing a bill and amended bill in equity.

The bill was filed in the court below October 21, 1889. The defendants, Mary Catherine Vanderwerker and others, heirs at law of Julia R. Marvin, demurred to the bill, and on hearing in the special term the demurrer was sustained, May 9, 1890, with leave to the complainant to amend. An amended bill was filed June 3, 1890, to which the same defendants filed a demurrer, and this also was sustained in special term July 10, 1890, and a decree passed dismissing the bill and amended bill. From this decree the complainant took an appeal to the general term, where the decree below was affirmed October 27, 1891, and the bill and amended bill finally dismissed in that court.

The present appeal, filed December 21, 1891, is from the last-mentioned decree.

The bill and amended bill are brought by the complainant, Eddy B. Townsend, against Mary Catherine Vanderwerker and others, heirs at law of Julia R. Marvin, late of the District of Columbia, deceased; Thomas B. Hood, administrator of the estate of the deceased, and John Goode, trustee, and Amos C. White, beneficiary, under a deed of trust mentioned in the bill.

The material allegations are—that Julia R. Marvin in her lifetime was seized of lot numbered one (1) in John B. Turton's subdivision of square numbered one hundred and seventy-nine (179), according to the plan of the city of Washington, District of Columbia; that she died February 3, 1889, intestate as to her real estate, and on May 31, 1889, letters of administration *cum testamento annexo* on her estate were granted to the defendant Thomas B. Hood; that on the 9th day of August, 1888, the said Julia R. Marvin incumbered the said lot of land by deed of trust to John Goode, trustee, to secure the payment to Amos C. White of the sum of $10,000 in ten years, with interest at 6 per cent. per annum; that the said Julia R. Marvin rented the said lot of land and improvements thereon from 1879, when the building thereon was erected, until the date of her death, and collected and received the entire rents therefrom, amounting, as the complainant charges, to at least the sum of $10,000; that the deceased died seized of other real estate liable to be sold for payment of her debts, and that the administrator has in his hands a considerable sum of money, derived from the collection of debts due to the estate of deceased and from sale of her personal effects, but the same is insufficient to discharge the debts due from the estate of the deceased.

The amended bill then proceeds (Record, p. 14) as follows:

"Tenth. That on or about the —— day of March, in the year 1879, an agreement was made and entered into between the plaintiff and the said Julia R. Marvin, by

which the plaintiff undertook and agreed to contribute in money and in work and labor one-half of the original cost of the said piece or parcel of land and the dwelling-house to be erected thereon, and in consideration thereof the said Julia R. Marvin undertook and agreed to convey to the plaintiff one-half interest in the said piece or parcel of land and the dwelling-house to be erected thereon, so that the same should be owned jointly by the plaintiff and the said Julia R. Marvin; that at the time of making said agreement there was no note or memorandum thereof in writing, but in the performance of the same on his part the plaintiff gave his personal attention and supervision to the selection and purchase of the materials for the said dwelling-house and the erection of the same, and also paid, laid out, and expended a large sum of money, to wit, the sum of four thousand dollars ($4,000), in defraying the cost of the erection of the said dwelling-house; that the said agreement, although not reduced to writing, on account of the intimate personal relations existing between the parties and the entire confidence they reposed in each other, has been fully executed and performed by the plaintiff (the amount of money contributed by him, to wit, the sum of four thousand dollars ($4,000), and the value of his services in selecting and purchasing the materials for the said dwelling-house and in superintending the erection of the same being equal altogether to one-half the cost of the said piece or parcel of land and the dwelling-house erected thereon); that the said Julia R. Marvin died without having executed her part of the said agreement by conveying to the plaintiff one-half interest in the said piece or parcel of land and the dwelling-house erected thereon, although she had repeatedly recognized the claim of plaintiff in her lifetime, and had declared to him and others that she had made adequate provision for the same in her last will and testament; that the services of the plaintiff in giving his personal attention and supervision to the selection and purchase of the materials for the said dwelling-house and the erection of the same were rendered in the years 1879 and 1880, and the money paid by the plaintiff in defraying the costs of the erection of the said dwelling-house and the original cost of the said piece or parcel of land was paid by him during the years 1879,

1880, 1881, 1882, 1883, and 1884, in various sums paid in hand to the said Julia R. Marvin, and sent to her in drafts by mail, as is evidenced by her repeated acknowledgments to the plaintiff and others during her lifetime, and by certain checks indorsed by her.

"That from the time of the rendition of the said services and the payment of the said money by the plaintiff in performance of his said agreement until the day of the death of the said Julia R. Marvin, the plaintiff constantly and repeatedly urged the said Julia R. Marvin to come to a settlement with him and to perform her part of the said agreement by conveying to him one-half interest in the said piece or parcel of land and the dwelling-house erected thereon; that the said Julia R. Marvin always, whenever the subject was referred to, from the time the claim of the plaintiff accrued to the day of her death, recognized and acknowledged the validity and justice of the said claim and assured the said plaintiff that she had provided for the same in her last will and testament; that on the fourth day of January, 1888, the said Julia R. Marvin admitted to a mutual friend that the said house never would have been built but for the fact that she and the plaintiff had built it together, and that he had taken the management of it all, as she never could have done and never would have attempted; that he had paid her in all four thousand dollars ($4,000), which she had used; that such was her feeling towards him that she intended the house should be his when she was done with it, and should belong to them jointly while she lived; that on the 14th day of November, 1887, she acknowledged to the same mutual friend that the plaintiff had, since 1878, when the lot was bought and they began planning for the house, up to 1883, paid her four thousand dollars ($4,000); that she had always regarded the house as belonging to them jointly; that she intended it should be his at her death, and that her will, then written, had so provided; that on account of the said repeated and constant acknowledgment of the validity of his claim by the said Julia R. Marvin from the time the services were rendered and the money was paid till the day of her death, and on account of the representations hereinbefore referred to as having been made to the said mutual friend and others, which representations were communi-

cated to the plaintiff, and on account of the intimate personal relations always existing between the plaintiff and the said Julia R. Marvin, and the unlimited confidence he reposed in her, they having lived together for a long time in the same dwelling-house, and she having treated and spoken of him as a foster child, the plaintiff failed and omitted to take such measures for the enforcement of his rights as under other circumstances he would have taken. The plaintiff avers that by the course adopted by the said Julia R. Marvin, and without any fault on his part, he has been lulled into a false security, and that he would have instituted his suit during the lifetime of the said Julia R. Marvin for the specific performance of her contract but for the assurance, repeatedly made to him and to others, that she had by her will devised the entire property to him; that the plaintiff did not know until the death of the said Julia R. Marvin of her failure to carry out her said agreement, when it was discovered, to his surprise and that of others, that she had died intestate as to her real estate.

"Eleventh. That the plaintiff is advised that, having performed on his part the said agreement hereinbefore mentioned, and having contributed his money and services upon the faith of the said agreement, it would be unjust and inequitable to deprive him of the benefit of the same, and that he is in justice and equity entitled to recover a sum equal to one-half of the value of the said piece or parcel of land and the dwelling-house erected thereon and one-half of the rents for the same received and collected by the said Julia R. Marvin in her lifetime, and also one-half of the rents accruing since her death."

The prayer (Record, p. 16) is as follows:

"That it may be referred to an auditor of this court to take and report to the court the following accounts:

"(1.) An account of the debt claimed by the plaintiff to be due and owing to him from the estate of the said Julia R. Marvin.

"(2.) An account of the debt due and owing to the said Amos C. White from the estate of the said Julia R. Marvin and all other debts and demands against the same.

"(3.) An account of the value of the said piece or parcel of land in the city of Washington and the dwelling-house erected thereon, and also an account of any other real estate of which the said Julia R. Marvin died seized and possessed and the value thereof, and that it be also referred to the auditor to ascertain who are the next of kin and heirs-at-law of the said Julia R. Marvin, deceased.

"(4.) An account of the rents of the said house and lot received and collected by the said Julia R. Marvin in her lifetime, and also a further account of any rent due and unpaid since her death.

"(5.) An account of the transactions of the said Thomas B. Hood, administrator as aforesaid, showing the collections made by him from the sale of the personal estate of the said Julia R. Marvin, or otherwise, and what disposition has been made of the same.

"That this honorable court will make a decree directing the payment to the plaintiff of a sum equal to one-half the value of the said house and lot hereinbefore mentioned and described, and one-half of the rents of the same received and collected by the said Julia R. Marvin in her lifetime and accruing since her death; that a decree may be made directing the sale of the said house and lot for the purpose of paying the debt claimed by the plaintiff to be due and owing to him from the estate of the said Julia R. Marvin, and the distribution of the balance of the proceeds of such sale among those entitled, according to their respective rights and interests; that a decree may also be made for the sale of the other real estate of which the said Julia R. Marvin died seized and possessed, if the same shall be necessary for the payment of her debts; that a writ of subpœna may be issued against each of the said defendants in due form, and that all such other and further aid and relief may be given to the plaintiff as equity and good conscience may dictate and the nature of his case may require."

Argument.

The bill and amended bill are not clearly framed, and the stating part and the special prayer for relief may be considered as in conflict.

The demurrer seeks to present all proper objections and defenses in law whether the case be regarded as a bill brought to enforce payment of a debt from the estate of the deceased or as a bill to recover damages for the breach of an alleged oral agreement for the conveyance of land or as a bill to secure the specific performance of an alleged oral agreement for the conveyance of land. Therefore the demurrer presents the defenses of the statute of limitations, a remedy at law, the statute of frauds, laches, multifariousness, and want of equity.

I.

The suit as for recovery of a debt or of damages for a breach of an oral agreement for the sale of land is barred by the Statute of Limitations.

If the suit be regarded as one brought to recover a debt from the estate of the deceased, Julia R. Marvin, or damages for a breach of the alleged oral agreement to convey a half interest in the lot of ground mentioned in the bill, the case is barred by the statute of limitations.

By the law of the District of Columbia actions for a simple contract debt and for debt for arrearages of rent and for damages for the breach of a contract are barred by the statute of limitations unless brought within three years ensuing the causes of such actions.

Maryland Statute 1715, ch. 23, sec. 2;
Shepherd v. *Thompson*, 122 U. S., 234;
Compiled Statutes, D. C., p. 360, sec. 6.

The allegations are that the complainant rendered his services in selecting and purchasing the materials for the house and in superintending the erection of the same in the years 1879 and 1880, and that he paid the money in defraying the cost of the erection of the house and the original cost of the ground during six years from 1879 to 1884. Thus the cause of action for his services accrued in the year 1880 and for recovery of the money not later than the year 1884. Actions upon these two claims were barred by the statute after 1883 and 1887, respectively. This suit was filed October 21, 1889.

There is no allegation that the value of the appellant's services was agreed upon, nor of their worth. Therefore there is no definite allegation of a debt due in this particular. Neither is there an averment of a debt due from the estate of the deceased in respect of the amount of money claimed to have been advanced or paid by the appellant, with or without interest. There are no sufficient averments of a specific debt due to the appellant to support the special prayer of the bill for an account to be taken of a debt; and the prayer for a decree directing the payment to the plaintiff of a sum equal to one-half the present value of the house and lot described in the bill and one-half of all the rents collected by Mrs. Marvin in her lifetime and accruing since her death, is not a prayer for payment of a debt, but it is an attempt to secure in money the equivalent (and, under the facts of the case, *far more* than the equivalent) of a decree for the specific performance of the alleged oral agreement.

The bill avers that there were certain acknowledgments made by Mrs. Marvin in her lifetime; but it does not show any acknowledgment by her of any pecuniary debt. The alleged acknowledgments are simply expressions of her "*feeling*" toward the appellant, and of her *intention* that the house should be his when she was

done with it, and should belong to them jointly while she lived.

This suit shows that her "feeling" changed, and that her intention was abandoned.

There is no allegation in the bill showing the time when Julia R. Marvin was to convey a half interest in the house and lot to the appellant, or when he was entitled to receive such conveyance. If he became entitled to such conveyance when he had made the last payment of money, in 1884, then his right of action for breach of the alleged agreement accrued at that date. Damages for breach of a contract can not be recovered in equity; but an action at law for recovery of damages for breach of the alleged agreement in this case was barred by limitations not later than 1887.

The appellant would be entitled to a part of the rents from the property in controversy only upon a finding that he is entitled to a decree for specific performance of the alleged agreement. As hereinafter argued, he is not entitled to such a decree; but if he could have such a decree he could not be given an interest in the rents received and collected or accrued prior to the date of the decree in his favor.

II.

The Appellant's remedy was plain, adequate, and complete at law.

The argument upon this point follows from the remarks made under the other propositions of this brief. If the case is one brought for recovery of a debt, or of damages for breach of contract, it is clear that the remedy was at law.

Recovery of damages for breach of a contract can not be had in equity.

Kempshall v. *Stone*, 5 John. Ch., 193.

The appellant had ample time during the lifetime of Julia R. Marvin, from March —, 1879, to February 3, 1889, to assert his claim for a debt, or for damages.

III.

The alleged agreement, if made, for a conveyance of a half interest in the lot and house mentioned in the bill, comes within the statute of frauds, and, not being in writing, no action can be brought upon it.

If the bill be regarded as brought to secure the specific performance, directly or indirectly, of the alleged oral agreement for the conveyance of a half interest in the lot of ground mentioned in the amended bill, the statute of frauds is a complete bar, and it is presented as a defense by the demurrer.

Some of the leading cases upon the subject decided by this court are—

Purcell v. *Miner*, 4 Wall., 513;
Williams v. *Morris*, 95 U. S., 444;
Randall v. *Howard*, 2 Black, 589;
Dunphy v. *Ryan*, 116 U. S., 496, 498;
May v. *Sloan*, 101 U. S., 237.

See also—

Repetti v. *Maisak*, 6 Mackey, 366;
Wristen v. *Bowles*, 82 Cal., 87;
Fortescue v. *Crawford*, 105 N. C., 31;
Ryan v. *Wilson*, 55 Texas, 38;
Tilton v. *Tilton*, 9 N. H., 390;
Brown v. *Lord*, 7 Oregon, 309.

A contract coming within the provisions of the fourth section of the statute of frauds, and not in writing, can not be enforced.

Fallon v. *Chronicle Pub. Co.*, 1 MacA., 485.

There is no special prayer for the specific performance of the alleged oral agreement, but the whole tenor of the amended bill indicates the object of the suit to be the securing of the benefit of the agreement. The tenth paragraph of the bill sets out an oral agreement for a conveyance of a half interest in the land described, and the eleventh paragraph asserts that the complainant is entitled to the benefit of the agreement, but claims it in money equal to one-half the present value of the land and improvements and one-half of all the rents received therefrom in her lifetime, by Julia R. Marvin and by her heirs since her death. The special prayer is for the payment of a sum of money; not, however, a definite sum, as for $4,000 claimed to have been paid to the deceased by the appellant, and an agreed price or a *quantum meruit* for the services alleged to have been rendered by him, but a sum equal to one-half the value of the lot and improvements and one-half of all the rents received and collected by Julia R. Marvin in her lifetime and accruing since her death. This, it seems to counsel for appellees, is either an effort to recover large damages for a breach of the alleged oral agreement, or a demand for the performance of the agreement, though in an indirect and unparalleled and inequitable manner.

The alleged agreement in this case was to convey in her lifetime, not to devise, but "an agreement to devise an interest in land, though founded on a precedent valuable consideration, is also within the statute of frauds."

Brown on Statute of Frauds, sec 263, and cases;

Gould v. *Mansfield*, 103 Mass., 408.

"A mere refusal (or a failure) to perform a parol agreement, void under the statute of frauds, is in no sense fraud, either in law or equity."

Wheeler v. *Reynolds*, 66 N. Y., 227, 234;
Crabill v. *Marsh*, 38 Ohio St., 338;
Harris v. *Harris*, 70 Pa. St., 174.

IV.

The allegations of the amended bill do not show acts sufficient to constitute part performance so as to take the alleged verbal agreement out of the statute of frauds.

The allegations are that the complainant paid a certain sum of money and gave his personal attention and supervision to the selection and purchase of the materials for the house and the erection of the same, the amount of money paid by him and the value of his services being equal altogether to one-half the cost of the land and the house erected thereon.

The amended bill shows that the deceased owned and had the possession of the land or lot at the time of the making of the alleged agreement; that she built the house; that she rented the house and collected all the rents, paid the taxes, made all the repairs, controlled and dealt with and encumbered the property at will; that she retained the possession to the time of her death, and now her heirs have it.

Assuming the allegations of the bill to be true, the appellant has done nothing more than pay money, through a period of six years, and render services that could be adequately measured and fully compensated by pecuniary recovery or damages. Such acts do not meet the equitable doctrine of part performance.

(A.)

The least act that constitutes part performance to take a verbal contract for the sale of land out of the statute of frauds is possession taken of the land in pursuance of the contract.

Upon this proposition also may be cited the cases of—

Purcell v. *Miner*, 4 Wallace, 518–9;
Williams v. *Morris*, 95 U. S., 456–7.

In the reports of decisions in the States many cases are found, and a few of them are here cited:

Moore v. *Small*, 19 Penn. St., 461;
Ackerman v. *Fisher*, 57 Penn. St., 457;
Cuppy v. *Hixon*, 29 Ind., 522;
Dugan v. *Gittings*, 3 Gill, 139, 157;
Gangwer v. *Fry*, 17 Pa. St., 491;
S. C., 55 American Decisions, 578, 580.

In *Sage* v. *McGuire*, 4 Watts & S., 229, a case brought to enforce a parol contract for the sale of land, the court says:

"Before a court of chancery will undertake to enforce the specific performance of a parol contract, it is indispensable to prove, by the most clear and indisputable evidence, the precise terms and nature of the agreement; and, in addition, that the vendee has taken the exclusive possession of the land sold, in consequence of and in pursuance of the contract. Also to enforce it against his heirs, it is indispensable that the possession be delivered in the lifetime of the vendor. For I know of no case where an imperfect contract, which wants the essential ingredient of a part performance before the vendor's death, has been enforced after the right of the heirs has attached. In all such cases the vendee must be left to his remedy at law, and can not invoke the aid of a court of chancery."

See also—

Heflin v. *Milton*, 69 Ala., 354;
Owings v. *Baldwin*, 8 Gill, 356;
Drury v. *Connor*, 6 H. & J., 292;
Brown v. *Lord*, 7 Oregon, 312;
McKee v. *Phillips*, 9 Watts, 86;
White v. *Watkins*, 23 Mo., 428;
Anderson v. *Simpson*, 21 Iowa, 404;
Neal v. *Neal*, 69 Ind., 423;
Reed on Statute of Frauds, Sec. 578;
Pomeroy on Contracts, Sec. 112.

(B.)

The payment of the purchase-money—whether in money or services the value of which can be estimated—is not of itself an act of part performance to take a verbal agreement for the sale of land out of the statute of frauds.

The cases sustaining this proposition are summed up and cited in—

Story's Eq. Jur., Sec. 761;
Pomeroy on Contracts, Secs. 112, 114;
Browne on Statute of Frauds, Sec. 461;
Reed on Statute of Frauds, Sec. 592;
Lester v. *Foxcroft*, 1 Lead. Cas. Eq., notes.

The following are selected as examples from "an unbroken current of authorities" on this subject:

Glass v. *Hulbert*, 102 Mass., 28, 30;
Blodgett v. *Hildreth*, 103 Mass., 486;
Temple v. *Johnson*, 71 Ill., 16, 17;
Forrester v. *Flores*, 64 Cal., 26;
Carlisle v. *Brennan*, 67 Ind., 19, 20;
Peckham v. *Balch*, 49 Mich., 181;

Ex parte Storer, Davies, 294;
Humbert v. *Brisbane*, 25 S. C., 510;
Crabill v. *Marsh*, 38 Ohio St., 338;
Eaton v. *Whitaker*, 18 Conn., 229;
Kidder v. *Barr*, 35 N. H., 255;
Cole v. *Potts*, 10 N. J. Eq., 69;
Jackson v. *Cutwright*, 5 Munf., 316, 318;
Greene v. *Jones*, 76 Maine, 567;
Ham v. *Goodrich*, 33 N. H., 32;
Meyers v. *Byerly*, 45 Pa. St., 368, 372;
S. C., 84 American Decisions, 497.

Some cases bearing particularly on services are—
Townsend v. *Fenton*, 30 Minn., 531;
Horn v. *Ludington*, 32 Wis., 73;
Edwards v. *Estell*, 48 Cal., 196;
Wright v. *Puckett*, 22 Grattan, 374, 377;

Part performance consists in *an act done outside of and beyond the contract.* It must be *an act indicative of existing ownership.*
Adams' Equity (*86)

To constitute part performance the act must show an agreement and the nature of the agreement.
Stoddert v. *Tuck*, 4 Md. Ch., 482;
Semmes v. *Worthington*, 38 Md., 326.

V.

The Appellant has been guilty of laches—his claim is stale and such as a Court of Equity will not countenance.

The amended bill shows: That the alleged agreement was made on the — day of March, 1879, between the complainant in person and Julia R. Marvin; that Julia

R. Marvin died February 3, 1889, nine years and eleven months after the making of the alleged agreement; that during that time she had unquestioned possession of the lot and house mentioned in the bill and collected the rents without protest from the complainant or demand for any part of them; that the complainant did not take any steps to assert his alleged rights in the property until after her death; that as late as August 9, 1888, the said Julia R. Marvin in dealing with the property encumbered it by a deed of trust to secure the payment of $10,000, and that she died seized of it.

It will be observed that no one of the alleged acknowledgments by the deceased is an acknowledgment of an agreement to convey to the complainant a half interest in the lot and house, but simply the acknowledgment of the receipt of money and a declaration by the deceased of her "*feeling*" *and intention* toward the complainant.

The *feeling and intention* of the deceased in regard to the property were entirely her own and subject at any moment to change by influences within or beyond her control, and did not give any contract rights to the complainant.

The allegations of facts and circumstances in the bill, it is submitted, not only do not show, but plainly negative, the "conscience, good faith, and reasonable diligence" on the part of the appellant which are essential to entitle a complainant to the aid of a court of equity.

The appellant had full personal knowledge of his rights, if any he had, from the date of making the alleged agreement for nine years and eleven months prior to the date of the death of Julia R. Marvin, and there was no impediment during any part of this time to the assertion of his rights.

On the contrary, the allegations show that there were

many reasons to prompt a prudent man having a just claim to diligence. The complainant says (Record, p. 15) that from the time he rendered his services and paid the money in performance of his part of the alleged agreement until the day of the death of Julia R. Marvin, he "constantly and repeatedly urged (her) to come to a settlement with him and perform her part of the said agreement by conveying to him a half interest in the said piece or parcel of land and the dwelling-house erected thereon." This allegation negatives his averment that he relied upon her declaration that she had provided for his claim in her last will and testament; because if she made such a declaration and he relied upon it he would not, naturally, have "constantly and repeatedly urged" her to convey the property to him. The fact that he found this course necessary should have been an indication to him that his rights, if any, were in danger of being lost. It was an indication of the necessity for diligent action on his part. Julia R. Marvin had full possession and control of the property; there was nothing on record to prevent her from conveying the property to another at any time; and she might die at any moment. Thus his rights, if any, were in instant and constant jeopardy. The bill shows that Mrs. Marvin, more than nine years after the making of the alleged agreement, if it was made, actually did convey the property to secure the payment of a debt for $10,000 borrowed money; and she died holding only an equity in the property.

The Court will take judicial notice of the fact that lot No. 1, in square No. 179, lies at the corner of 16th and Q streets, northwest; and that it was that part of the City of Washington which from 1879 to 1889 showed the greatest increase of values in real estate. This rising value should also have been a spur to the appellant if he had a just claim; as by delaying prompt action his loss, if it should come, would be the greater.

Thus, in addition to the facts that the appellant had full personal knowledge of his rights, if any, for almost ten years before Mrs. Marvin's death, and there was no impediment to an earlier suit, there were many inducements for him to act with diligence.

Some of the later cases decided upon the subject of laches by this Court are:

Halstead v. *Grinnan*, 152 U. S., 412, 416;
Johnston v. *Standard Mining Co.*, 148 U. S., 370–1;
Galliher v. *Cadwell*, 145 U. S., 371–3;
Hammond v. *Hopkins*, 143 U. S., 250, 273;
Underwood v. *Dugan*, 139 U. S., 384;
Hanner v. *Moulton*, 138 U. S., 492, 495;

From the earlier cases the following are cited for convenient reference:

Richards v. *Mackall*, 124 U. S., 183, 189;
Speidel v. *Henrici*, 120 U. S., 377, 387;
Lansdale v. *Smith*, 106, U. S., 392;
Badger v. *Badger*, 2 Wallace, 87;
McKnight v. *Taylor*, 1 Howard, 161;
Wagner v. *Baird*, 7 Howard, 234;
Holt v. *Rogers*, 8 Peters, 433;
Godden v. *Kimmel*, 99 U. S., 201, 211;
Marsh v. *Whitmore*, 21 Wall., 178, 185;
Hume v. *Beale*, 17 Wall., 336;
Brown v. *Buena Vista Co.*, 95 U. S., 157, 167;
Bowman v. *Wathen*, 1 Howard, 189, 193–4;
Piatt v. *Vattier*, 9 Peters, 416;
Stearns v. *Page*, 7 Howard, 819;

What constitutes a stale claim depends upon the circumstances of each case, and no definite or particular time is fixed to govern all cases.

The circumstances of the case at bar are such as to bring it clearly and fully within the principle established by this Court and maintained in a long line of decisions.

In the following cases the time was four, five, six, seven, nine, twelve, and seventeen years, under a variety of circumstances.

Sullivan v. *Portland R. R. Co.*, 94 U. S., 811;
McQuiddy v. *Ware*, 20 Wall., 14, 20;
Hayward v. *Eliot Nat. Bank*, 96 U. S., 617–9;
Harwood v. *R. R. Co.*, 84 U. S., 79;
New Albany v. *Burke*, 78 U. S., 108;
Lupton v. *Janney*, 13 Peters, 385;
Pratt v. *Carroll*, 8 Cranch, 471;
Twin Lick Oil Co. v. *Marbury*, 91 U. S., 587;

In cases of this kind the death of parties who could explain the transaction has always been regarded as a controlling circumstance.

Hammond v. *Hopkins*, 143 U. S., 273–4;
Mackall v. *Casilear*, 137 U. S., 566;
Godden v. *Kimmel*, 99 U. S., 210;
Jenkins v. *Pye*, 12 Peters, 254.

In the case of *Preston* v. *Preston*, 95 U. S., 200, this Court held that—

"When one having a contract for the conveyance of lands permitted the other party to execute a deed of trust of the lands to a trustee to secure certain indebtedness, with a power to sell them, if necessary, for the payment of such indebtedness, he had waived his right to the conveyance, or at least, had subordinated it to the interest of the trustee and the purchasers under him."

VI.

The amended bill is multifarious.

The special prayer of the amended bill in the case at bar is peculiar, to say the least; and, if it is to be con-

sidered, it renders the bill multifarious. The tenth paragraph of the bill sets out a verbal agreement to convey an interest in land; and the eleventh paragraph declares the object of the bill to be to secure the "benefit of the same." The special prayer is for the payment of "a debt;" not, however, a debt in a definite and fixed sum, but "equal to one-half the value of said house and lot and one-half of the rents of the same received and collected by the said Julia R. Marvin in her lifetime and accruing since her death."

There is no allegation in the amended bill of a debt due from the deceased to the appellant, or of any agreement or promise, express or implied, by her to pay a debt. The allegations all relate to a verbal agreement to convey a half interest in the house and lot mentioned in the bill. To what should the defendants respond—to the allegations of a verbal agreement to convey a half interest in the lot and house without a special prayer for its performance, or to a special prayer for the payment of a debt without any allegations showing the possible origin or existence of a debt?

A contract to convey land is not, and can not be, a contract to pay a debt. In respect of one and the same transaction, if it ever occurred, the complainant demands the performance of a contract to convey land and prays the payment of a debt—matters of different natures.

VII.

Upon the case made by the amended bill the appellant does not show any equity. Equity is with the appellees.

If the appellant had brought his bill for specific performance of the alleged agreement in the lifetime of the deceased he could not have secured such relief. The

allegations of the amended bill show that he at no time had a case for relief in equity. Had he brought his bill against Julia R. Marvin within six months, or a year, or nine years and eleven months, after the making of the alleged agreement (if it was made), he could not have had specific performance of the agreement; his bill would have been dismissed, because under the alleged facts of the case his remedy was plain, adequate, and complete at law, and he should have pursued it there, for recovery of any money paid and for any services rendered, or for recovery of damages for breach of the alleged agreement. By the principles of both equity and law that was his only remedy, and by the statute, also, it is so fixed.

Rev. Stat. U. S., sec. 723.

Lapse of time and neglect to pursue a remedy at law do not convert a case originally remediable at law into a case for relief in equity. Lapse of time and negligence in cases properly falling within the province of a court of equity serve to defeat the relief which such court would otherwise give, and, in such cases, as said by this Court in *Hume* v. *Beale* (84 U. S., 336), "a court of equity will not relieve the party, but leave him to bear the fruits of his own negligence or infirmity of purpose."

If the alleged facts and nature of the case presented by the amended bill had been such at the time of their origin as to bring the case within the province of a court of equity the appellant's want of "conscience, good faith, and reasonable diligence" in asserting and pursuing his rights would now operate to deprive him of relief. Having full knowledge of his rights, if any he ever had, and every opportunity and inducement to attempt to enforce them for almost ten years during the life of the party with whom the alleged verbal agreement was made, he has delayed bringing his suit until after her death, new interests have attached, the property has greatly advanced

in value, evidence is lost, and death has sealed the lips of the one person whose testimony could give convincing and conclusive denial to the alleged agreement sought to be established by the single voice of the appellant himself.

The equity of the case is with the appellees.

It is respectfully submitted that the bill and amended bill were properly dismissed, and that the decree below should be affirmed.

J. H. LICHLITER,
Counsel for Defendants, Appellees.

APPENDIX.

The opinion of the court below not being printed in the "Transcript of Record," or with the appellant's brief, it is here printed, together with the syllabus of the case, as reported in 9 Mackey (20 D. C.), 197:

EDDY B. TOWNSEND
vs.
MARY C. VANDERWERKER.

1. The averments of a bill in equity, when they are ambiguous, are to be taken most strongly against the complainant.
2. A bill in equity can not be sustained upon a mere claim for damages for the failure to specifically perform an alleged contract; the remedy is at law in such a case.
3. Payment of a consideration is not such a part performance of a parol contract to convey lands as will take the case out of the Statute of Frauds; and whether the consideration consists of money or personal services the rule seems to be the same.

4. The part performance must be that sort of a partial execution of the contract which results from entering into possession, making outlays on the property, etc., so that a party can not be completely restored to his former position.

5. Breach of a promise to do something in the future is not such a fraud as would be an answer to the defense of limitations; the fraud must be some concealment or misrepresentation as to existing facts which prevented the plaintiff from sooner instituting his suit.

In equity. No. 12,084. Decided October 27, 1891. The Chief Justice and Justices Cox and James sitting.

APPEAL from a decree dismissing a bill upon demurrer. *Decree affirmed.*

The facts are stated in the opinion.

* * * * * * *

Mr. Justice Cox delivered the opinion of the court.

This is a bill filed in equity upon an alleged agreement entered into between the complainant and one Mrs. Julia Marvin. The suit is brought against the heirs and administrator of Mrs. Marvin. It came before the court below on demurrer; the demurrer was sustained; a decree was passed dismissing the bill, and an appeal taken from that decree to this court. On the argument it was urged that in the consideration of this demurrer the court was not confined to the exact facts stated in the bill, but might assume that other facts were capable of being proved under the general averments of the bill; in other words, it was sought by the complainant to take advantage of the ambiguities of the bill.

We do not understand the law to be to that effect. The bill is ambiguous in some respects, but the averments of the bill are to be taken most strongly against the complainant himself, and any ambiguity in them must operate to his disadvantage instead of to his benefit.

Now, the facts substantially stated by the complainant are: First, that Mrs. Marvin was seized in her lifetime of

sub-lot 1, square 179, and in March, 1879—before that we are bound to suppose that she was seized of it—an agreement was entered into between the complainant and Mrs. Marvin by which the complainant agreed to contribute in money, and in work and labor, one-half of the original cost of the piece of land and of a dwelling house to be erected thereon, and in consideration thereof Mrs. Julia Marvin undertook and agreed to convey to the complainant a half interest in the said piece of ground and the dwelling house to be erected thereon, so that the same should be jointly owned by the complainant and the said Julia R. Marvin. At the time of the making of said agreement there was no note or memorandum thereof in writing, but, in the performance of the same, on the part of the complainant, he gave his personal attention to the purchase of the materials for said dwelling and the erection of the same, and also paid, laid out, and expended a large sum of money, to wit, the sum of $4,000, in defraying the cost of the erection of the said dwelling house. The bill goes on to aver that the complainant rendered his personal services in the year 1879 and paid the sum of $4,000 towards the cost of the dwelling in different amounts and through a period of over six years, the last of the payments being in the year 1884. He avers that $4,000 and the value of his services in selecting and purchasing the material and superintending the erection of the building are equal to one-half of the cost of the lot and building. He then proceeds to say that subsequently Mrs. Marvin received the rents from the building from the year 1879 until her death, which took place early in 1890 or 1889; and in 1888 she executed a deed of trust on the premises to secure $10,000 to one Amos C. White for money borrowed. That is the substance of the case stated by the complainant. There are other matters stated which I shall allude to presently, which were very little more than explanatory of the delay on the part of the complainant in the institution of the suit. Now, upon this statement of the complainant's case, we would be prepared to expect a prayer for a decree for specific performance; but that is not the relief prayed. The prayer is, first, that the cause may be referred to an auditor to take and report to the court the following accounts:

1. "An account of the debt claimed by plaintiff to be due and owing to him from the estate of the said Julia R. Marvin.

2. "An account of the debt due and owing to the said Amos C. White from the estate of the said Julia R. Marvin, and all other debts and demands against the same.

3. "An account of the value of the said piece or parcel of land in the city of Washington, and the dwelling house erected thereon, and also an account of any other real estate of which the said Julia R. Marvin died seized and possessed and the value thereof; and that it be also referred to the auditor to ascertain who are the next of kin and heirs at law of the said Julia R. Marvin, deceased.

4. "An account of the rents of the said house and lot received and collected by the said Julia R. Marvin in her lifetime, and also a further account of any rents due and unpaid since her death.

5. "An account of the transactions of Thomas B. Hood, administrator, showing the collections made by him from the sale of the personal estate of the said Julia R. Marvin, or otherwise, and what disposition has been made of the same."

He next asks that "the court will make a decree directing the payment to the plaintiff of a sum equal to one-half the value of the said house and lot hereinbefore mentioned and described, and one-half of the rents of the same received and collected by the said Julia R. Marvin in her lifetime and accruing since her death; that a decree may be made directing the sale of the said house and lot for the purpose of paying the debt claimed by the plaintiff to be due and owing to him from the estate of the said Julia R. Marvin, and the distribution of the balance of the proceeds of such sale among those entitled, according to their respective rights and interests; that a decree may also be made for the sale of the other real estate of which the said Julia R. Marvin died seized and possessed, if the same shall be necessary for the payment of her debts," and then there is a prayer for process and that the plaintiff may have "such other and further aid and relief as equity and good conscience may dictate and the nature of his case may require."

It will be observed that the specific prayers for relief do not refer to a specific performance of an agreement to convey one-half of this property to the plaintiff. He claims that the estate of Mrs. Marvin is indebted to him for two things: first, a sum equal to one-half of the value of the property which she, according to the statement in the bill, was to convey to him; and secondly, one-half of the rents and profits which she collected from the improvements. Of course this is purely a matter of the collection of a claim for money due him on account of money laid out and expended by him, or a claim for damages for not conveying the house to him. It is a claim which might have been asserted at law, and it is one of the grounds of demurrer in the case, that there is an adequate remedy at law, and that is the proper remedy for the collection of this kind of an account. There is no ground whatever for coming to a court of equity for damages for the failure to specifically perform the alleged contract. There are cases in which on the failure to obtain specific performance compensation has been allowed in damages. A party, for instance, goes into possession under a contract which can not be performed; he is entitled to be allowed compensation for his outlays and actual losses, which would be ascertained by an issue of *quantum damnificatus*, but there is no ground for going into equity, broadly claiming damages for the non-performance.

This question of damages was discussed in the case of *Hempshall* v. *Stone*, in 5 Johnson's Chancery Reports, page 193. In this case there was a contract to purchase land, but the purchaser was slow in making his payments, and the defendant conceived himself released from obligation to complete the contract and sold the property to a third person, who bought it without notice of the first contract. The plaintiff filed his bill in a court of equity for specific performance, and under that he sought to recover damages as compensation. The court says: "The jurisdiction of the court on this point was discussed in the case of *Hatch* v. *Cobb*, 4 Johnson's Chancery Reports, page 559, and it was considered that the court ought not, except in very special cases, to sustain a bill merely for the assessment of damages. The more I have reflected on the subject the more strongly do I

incline to that opinion. Lord Eldon intimated in *Todd* v. *Gee*, 17 Vesey, page 273, that the whole course of previous authority was against the decision of Lord Kenyon in *Denton* v. *Stewart*, 1 Cox, page 258, and in that case Lord Eldon said the defendant had disabled himself *pendente lite* from performing the agreement, and that fact materially distinguishes that case from this. When the defendant has disabled himself before the filing of the bill and the plaintiff knew of that fact before he commenced his suit (and I consider such knowledge a material circumstance in such case), it is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal, and not of equitable jurisdiction. The remedy is clear and perfect at law by an action upon the covenant; and if this court is to sustain such a bill I do not know why it might not equally sustain one in every other case sounding in damages and cognizable at law. This court is not the ordinary and appropriate tribunal for such actions."

There are other objections to this claim for one-half of the value of the property, and one is that of the statute of limitations, which was also one of the grounds of demurrer. The services rendered by the plaintiff, he says, were rendered in the years 1879 and 1880, and this bill was filed in 1890, ten years afterwards. The payments made by him run through six years, the last one being, I think, in 1884, six years before the bringing of this suit, so that the claim for compensation for the rendition of those services is clearly barred by the act of limitations. But it is claimed that there were acknowledgments made by Mrs. Marvin, in her lifetime, which would be an answer to that defense. The bill, however, does not aver any acknowledgment by her of any pecuniary debt, but it avers that she repeatedly acknowledged that she was under obligations to the defendant, and said that she looked upon the house as belonging jointly to him and her, and that she had made her will giving the whole of it to him at her death. There was no real acknowledgment that she was pecuniarily indebted to him.

In addition to the claim for half of the value of the house and lot, he claims one-half of the rents collected

by Mrs. Marvin, and her heirs, since her death. This claim for rents also would be barred by the statute of limitations, to a certain extent. It is not averred in the bill that a conveyance of an interest in the property was to be made before he had completed his part of the contract by making the payments. The payments for the house and lot were not completed until 1884, so that there could not have been a right to claim a conveyance until that time. If we understand the averments of the bill, no rents could be recovered before that time, and this defense of limitations would prevail against the recovery of rents accruing before three years before the suit was instituted. So that the claim, under any circumstances, would be limited to rents received from June, 1887. But there is a further objection to this. As I have stated, the claim for rents would only be on the theory that the plaintiff would be entitled to a specific performance of the contract to convey the land. It is possible, and it may be admitted, that a joint tenant, co-parcener, or a tenant in common, would have a right to file a bill in equity for an account of rents received by a co-owner, and he would not be confined, perhaps, to an action at law to recover as for money had and received, but that must be a case in which the parties are admittedly joint owners.

But where a bill is filed for the purpose of compelling specific performance, I have never known a case in which a court recognized the right of a party to an accounting of rents received by the defendant from the time that the alleged contract to convey was made. The right to a specific performance is not a strict right but one depending on the sound discretion of a court of equity, and therefore the complainant has no right, strictly, to claim a part of the income as if he and defendant had been the joint owners of the land, when he becomes the owner only from the time when the court decrees specific performance. But it is quite clear that if he could claim the rents and profits at all, it would only be on the theory that he is entitled to the land itself, and to a specific performance of a contract to convey it.

I should state here that it is as least doubtful whether the relief by specific performance could be given under

this general prayer for relief, because that is really contrary to the whole scheme of the bill. It is not the relief that the plaintiff wants. Since a contract was made with him, as he alleges, Mrs. Marvin conveyed her property to secure a debt of $10,000, which is about one-half of the value of the land. She has practically conveyed, then, one-half of the value, retaining an equity which is only about one-half the value, and if the court would decree a conveyance of one-half of the interest remaining to her heirs it would give the plaintiff only one-fourth of the value of the land. He claims that he is entitled to one-half of the value, and for that reason, probably, instead of asking a decree for the conveyance of an undivided half interest which would be subject to that deed of trust, he asks for a sum of money equal to one-half of the entire value of the land. So that a decree of specific performance seems to be entirely outside of the scheme and scope of this bill of complaint, and it is not that relief which is sought by the bill.

But suppose, however, that he does ask for specific performance. He is met at once with the objection of the statute of frauds. That is relied upon as one of the grounds of demurrer. The objection is attempted to be overcome by proof of part performance of the contract. But it is very well settled that payment of a consideration is not such a part performance as will take the case out of the statute of frauds, and whether that consideration consists of money, or personal services, the rule seems to be the same. Authorities have been cited which I will refer to if necessary, but it was conceded on both sides that mere payment either by personal services, or money, is not the kind of part performance which will furnish an answer to the objection of the statute of frauds. The part performance must be that sort of a partial execution of the contract which results from entering into possession, making outlays on the property, etc., where a party can not be put back into the condition in which he was before; or, at least, completely restored to his former position. In that case the court would decree specific performance. That is not the case presented here, because the bill here shows that Mrs. Marvin, herself, was in possession from the time that this house was erected and has always received the

rents, and it does not show that the plaintiff ever took possession at all, and still less, that he did so in pursuance of any contract for the purchase of an undivided moiety.

One thing which seems to be relied upon is that the plaintiff had been misled and defrauded by Mrs. Marvin, by her repeated representations that she would take care of him when she made her will, and would leave the whole property to him after her death. By these representations he says he was lulled into security and failed to take any steps to have his rights settled. This promise on her part was to do something in the future, which does not constitute a fraud, and which would not be an answer even to the defense of limitations. The kind of fraud that would be an answer to the defense of limitations must be some concealment or misrepresentation as to existing facts which prevented the plaintiff from sooner instituting his suit. We do not think, therefore, that there is any way of getting over this defense which has been interposed by way of demurrer.

It might be further remarked here that the case does not present a very strong one for relief. It is not stated what the value of the ground was or what estimate was agreed upon as the value of the plaintiff's services to be rendered, or what the house cost, or when the deed was to be executed, conveying the interest to the plaintiff, whether at the time of the agreement, or after the services were rendered; and a court of equity would hesitate, on a bill for specific performance, to enforce such a contract as that after the death of the party said to be jointly interested, when she can not be heard from and when the contract can only be proved by the testimony of the plaintiff himself, there being no witnesses to it, and no declaration of hers proved to have been made to other persons, at any time, as to the terms of this alleged agreement. A court would find a great deal of difficulty in enforcing a contract so vague in its terms.

We are, therefore, of the opinion that the ruling of the Court below on the demurrer must be sustained.

Office Supreme Court, U. S.
FILED
NOV 20 1895
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States

EDDY B. TOWNSEND,
Appellant
vs.
MARY C. VANDERWERKER, et al.
Appellees.

No. 73.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Appellant's Reply to Appellees' Brief.

BENJ. BUTTERWORTH,
JULIAN C. DOWELL,
Counsel for Appellant.

WASHINGTON, D. C.
THE CAPITAL PRESS
1895

IN THE

Supreme Court of the United States

EDDY B. TOWNSEND, APPELLANT, vs. MARY C. VANDERWERKER, ET AL. } No. 73.

Appeal from the Supreme Court of the District of Columbia.

APPELLANT'S REPLY TO APPELLEES' BRIEF.

The bill States that Julia R. Marvin was during her lifetime seized in fee of certain real estate which is described.

When she acquired it, or how, is not distinctly stated, except that it may be inferred from paragraphs 10 of the Bill and Amended bill.

The pleading further states, that the said Julia R. Marvin departed this life on the 3rd of February, 1880, *intestate, as to her real estate*, and that Letters of Administration upon her personal estate were granted by the Supreme Court of the District of Columbia, sitting as Probate Court, to Thomas B. Hood, as administrator, who is made a party defendant hereto.

The Bill then mentions a large number of persons supposed

to be heirs at law to Julia R. Marvin, and they are made parties defendant.

Julia R. Marvin had executed a deed of trust to Amos C. White for $10,000, and Amos C. White is made party defendant.

It is also stated that Julia R. Marvin was seized of some other real estate and personal property which is liable to be sold to pay her debts.

In the tenth paragraph of the Bill the interest of the appellant Townsend, in the real estate, mentioned and described in the Bill, is set forth, and the relationship that obtained between the said Julia and the said Townsend is described and their dealings with eath other with reference to said real estate is set forth.

Analyzing that statement, the following facts appear? That about the —— day of March, 1879, an agreement was made and entered into between the plaintiff and his foster mother, the said Julia R. Marvin, by which the plaintiff undertook and agreed *to contribute* in money and in work and labor, one-half of the original cost of the piece or parcel of land, and the dwelling *to be erected* thereon, and that the said Julia R. Marvin undertook and agreed to convey to plaintiff one-half interest in the said piece or parcel of land, and the dwelling house *to be erected* thereon, so that the same should be *owned jointly* by the plaintiff and the said Julia R. Marvin that in pursuance of the same, on his part, the plaintiff gave his personal attention and supervision to the selection and purchase of the materials for the said dwelling house, and the erection of the same, and also paid, laid out and expended a large sum of money, to wit, the sum of $4,000, in defraying the cost of the erection of the said dwelling house.

It will be observed that this was not paid *to Julia R. Marvin* under any contract of purchase, or *to her* on account of any purchase price, but as his *contribution* of half the purchase price

for the lot, and erecting the dwelling in pursuance of original purchase and agreement to build.

It further sets forth that said agreement though not reduced to writing on account of the intimate personal relations between the said Julia and her foster son, it was, nevertheless, carried out fully on his part.

And it discloses why it was that the said Julia did not convey to him, Townsend, his half of the property. It was this: That admitting his claim and that he was joint owner with her, she did not make formal settlement and convey, because she had, in fact, to his knowledge, and to the knowledge of their mutual personal friends, not only provided to give him his half, but by her will then executed vested him with her half also.

In the amended Bill which will be found on page 7, the facts hereinbefore recited are repeated. It is there averted in paragraph 10, that the validity and justice of plaintiff's claim to one-half was admitted, and always recognized by the said Julia, that she had provided for the same in her last will and testament; that she stated and admitted that he had paid the amount, as claimed by him, and that the property was to be wholly *his* after her death, and belong to them *jointly while she lived*.

It also sets forth that she had stated, that *they*, not *she*, but they began planning for the house before the lot was bought in 1878; that she had always regarded it as belonging to them *jointly*, and that she intended it should be his at her death; that her will, then written, had so provided.

The Bill states, section 10, of the unlimited confidence he reposed in her, they having lived together for a long time in the same dwelling house, and she having treated and spoken of him as her foster child.

The Bill does not say in what dwelling house they lived to-

gether when she lived with her foster son, but the fact is, that she was a member of his father's *household* in *Virginia*,

That she came with her foster son to Washington; that they resided in the same family here, and when he had completed the building in controversy, *they moved in* and resided *there*; and he never was out of possession for a minute, until after her death, when these remote, very remote, relatives got possession of the key in Townsend's absence.

The Bill further states that he would have insisted upon a formal conveyance to him of his half of the property, "but for the assurance repeatedly made *to him*, and to others, that she had by her will devised the *entire property* to him;" and he did not know until her death that she had destroyed that will, which she had in fact made, vesting in him the legal title to his own half, the equitable and possessory title of which he then had, and also the *title* to *her* half.

For not bringing suit against his foster mother under these circumstances, the Court below said he was guilty of laches; sleeping on his rights.

It will be observed that a few months prior to her death, she made a new will, which is matter of record, and as it is matter of public record, we may mention it, that her personal property she gave to Mr. Townsend and the members of his family, leaving him stock of the face value of $5,000, but which was in fact worthless; these very remote heirs are not mentioned or referred to in the will. The real estate in controvery she tried to devise to the "Minor Schoo!" for colored children, of Washington, but the will was defective in execution and as to the real estate inoperative.

The Bill of Townsend asks for an accounting for his interests, or for such relief as on the facts, justice and equity may demand.

The Bill may convey the impression to counsel for appellee

that it is an action for debt, or damages for failure to convey real estate. It is in fact nothing of the kind, but is a bill for such relief as the Chancellor may on all the facts presented adjudge to be just.

On what theory Townsend could be held to be guilty of laches, or sleeping upon his rights, it is difficult to see. He and his foster mother, to whom he was devoted, his foster mother who had not a child or grandchild living, neither father nor mother living, neither brother nor sister, neither nephew nor neice, joins with her foster son, the child of the same household if not of her loins, to buy a lot and build a home.

This they do. He pays his half and more, and she pays part of hers, and a mortgage which she gives to Amos C. White secures what she should have paid and what is still due, and which is a lien upon *his* half as well as upon her own. He pays his full half and instead of conveying it to him, she tells her foster son that she has not only conveyed *his* half, but also *her half*, by will which she has executed, and of which he and their mutual friends have knowledge.

On what theory of law or morals, he should have suspected her honesty and candor, or doubted her affection, or have been dissatisfied with having the whole instead of half, is not clear to ordinary mortals.

We submit that on the facts presented in the bill, the defendants should be required to answer and the evidence in support of the allegation be heard; otherwise, in the language of Lord Hardwick, the Statutes of Frauds, relied upon by the appellee becomes an instrument of fraud itself, and promotes grand larceny, practiced within the law.

It is proper to say just here, that the case was called for argument before the adjournment of the last Spring Term, but was not reached for actual argument, and hence the brief of the learned counsel for the appellee was not filed, and hence the

brief filed by myself was written without seeing his. I have therefore filed this brief in answer to points made in the brief of the appellee.

The first point raised by the demurrer is the Statute of Limitations, the objection being that the action was not brought within three years from the time the right of action accrued in 1884 or 1885, as the case may be.

The answer is twofold:

This is not a suit for the recovery of a *debt* or *damages* for the breach of a parol agreement for the sale of land.

It is a bill for relief, and neither the Statute of Limitations or the Statute of Frauds can operate as a bar.

But if it were otherwise, Julia R. Marvin not only admitted the justice of the claim, the existence of the obligation, but up to near the date of her death said she had provided for it in her *will*, as in fact she had

And while I urge nothing on this point, if important, that she irrequivocally acknowledged the debt.

(Wood on Limitations, Sec. 68, p. 193.)

The statement that she had paid it or secured its payment by her will was relied on by her foster son. She could not take advantage of that fraud; nor could those who claim as her heirs be heard to say, true, Julia R. Marvin admitted the claim and satisfied you by her answer that she had not only provided for its payment, but had done better, had given double the value in her will; but that just before her death she destroyed that will, and thus she defrauded you, and we are the beneficiaries of that fraud.

On reason and authority the Statute of Limitations cannot apply in this case. Because—

First. There was a trust in favor of Townsend, which was admitted. The trustee did not hold adversely; both were in possession of their home as joint owners. He had entered into possession, made the purchase, built the house, and they occupied it as joint owners.

Second. Julia R. Marvin stated distinctly that Townsend had paid for his half and that they *were joint owners*, and further, that she did not convey his half, *because* she had done *better* than that, she had by her will then made, given him both halves. He was to her foster son. He trusted her implicitly. They did not deal at arms' length.

Hence, if there was delay, it was due to *her*, and it would be a fraud to permit her to assure him and their mutual friends that a formal conveyance of *his* half was unnecessary, as she had already made her *will* giving him *both halves*.

Hill on Trustees (page 265) says: Even in cases of constructive trusts mere lapse of time will not always be a bar to relief.

He must have knowingly acquiesced in being deprived of his rights by the trustee.

And on page 266, same work, it is said—

> "Where the conduct of the trustee is tainted with fraud, the same doctrine will be applied with even greater stringency; and the time will commence running only from the discovery of the fraud."

THE DEMURRER SETS UP THE STATUTE OF FRAUDS.

The Statute of Frauds can have no application here for two reasons:

First. Section 9 (p. 231) of Com. Stats. of District of Columbia provides as follows:

> "SEC. 9. Provided always, that whereany conveyance shall be made of lands or tenements by which a trust on confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding."

By said section implied or constructive trusts are exempt from the operation of the Statute.

Second. On the facts presented by the bill to allow the operation of the Statute of Frauds as a bar, would be to use the Statute not to defeat but to commit a fraud, and on reason and authority this is condemned.

In that behalf Lord Hardwicke said:

> The court has adhered to the principle that the Statute of Frauds shall never be understood to protect fraud; and therefore wherever a case is infected with fraud the court will not suffer the statute to protect it, so that any one should run away with a benefit not intended.
>
> See Hill on Trus.
> Top p. 263.

And he goes on to say that parol evidence will be admitted for the purpose of establishing the case, etc.

These heirs, *distant* heirs, *very* distant heirs, cannot avail themselves of the fraud on Townsend.

Lord Chief Justice Wilmot said:

> Let the hand receiving the gift be ever so chased, yet if it comes through a polluted channel, the obligation of restitution will follow it.
>
> (Hill on Trustees, top p. 256.)

> Also where a person, by means of his promises or otherwise by his general conduct, prevents the execution of a deed or will in favor of a third person, with a view to his own benefit * * * the person so acting will be decreed to be a trustee for the injured party to the extent of the interest of which he has thus been defrauded.

Read Hill on Trus., p. 151:

And for a stronger reason persons having no right to or claim upon the estate can avail themselves of such fraud.

Statute of Frauds, Hill on Trustees, page 263:

> Where a case of fraud is made by the bill, parol evidence will be admitted for the purpose of establishing that case, even though the effect of such evidence be to alter or vary a written instrument, and although the benefit of the statute be insisted upon by the defendant.

Where the facts are stated with directness and precision, and constitute fraud in themselves, an allegation of fraud in totidem verbis is not necessary.

> Kenedy vs. Kenedy, 2 Ala., 571.
> McCalmont vs. Rankin, 8 Hare., 15.
> Shrine vs. Simmons, 11 Geo., 401.
> See Erie vs. Potter, 15 How. USS., 56.

Justice Story says: Sec. 308, speaking of Constructive Fraud:

> If confidence is reposed it must be faithfully acted upon and preserved from any intermixture of imposition."

And further, same section,—

> The general principle which governs in all cases of this sort is that if a confidence is reposed, and that confidence is abused, courts of equity will grant relief.

And it was said in the case of Smith vs. Kay, 7 H. L. Cases, 750.

> And the presumptions are all in favor of the party in the dependent position.

Story, in Sec. 384, under the title Constructive Frauds, presents just such a condition as we have here.

> * * * Where a man designedly or knowingly produces a false impression upon another who is thereby drawn into some act or contract injurious to his own rights or interests, courts of equity will exercise an exclusive and salutory jurisdiction.

And further, he says that there can be no real difference between an express representation and one that is naturally or necessarily implied from the circumstances.

Page 848, Story's Equity Jurisprudence, the rule as to Statute of Limitation is laid down and authorities cited. That the statute is no bar in this case is clear, as equity does not aid in the consummation of a fraud.

In case of fraud the statute begins to run as soon as the fraud is discovered.

Story's Equity Jurisprudence, p. 74, 2d Vol., Sec. 759—

> "Where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse it would work a fraud upon the former to suffer this refusal to work to his prejudice."

I am aware that a case for relief must be presented by the bill.

But if it be true that the bill in this case was based upon the idea that the *will* was the *source* and *origin* of title. Yet, clearly, that is a mistake, as the will performed no office other than to join the *legal* title with the equitable and possessory title.

Julia R. Marvin could *change* her *will*, but she could not by that act *change* her *obligation*, nor oust her foster son of his right and title to the property he owned.

I have examined the authorities cited by counsel for appellee. The law is conceded; but it don't apply to the facts of this case.

The leading case cited, Purcell vs. Miner, 4 Wall 513, rests upon a fundamental proposition—and adherence to which in this case, I think, should have constrained the Court below to overrule the demurrer, and put the defendants upon their answer. Speaking of the Statute of Frauds which was relied upon in that case, this Court said:

> "Nevertheless, Courts of Equity have, in many instances, relaxed the rigid requirements of the statute; but it has always been done for the purpose of hindering the statute made to prevent frauds from becoming the instrument of fraud."

Is it not obvious on the face of the bill, that to deny the appellant a hearing, is to make the statute "*the instrument of fraud.*"

Respectfully submitted.

BENJ. BUTTERWORTH,
JULIAN C. DOWELL,
of Counsel.